FILE COPY

JAMES R. BROWNING, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

No. 196

MERLIN M. ARMSTRONG, ET AL., *Petitioners*

v.

THE UNITED STATES, *Respondent*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

DONALD S. DAWSON
*Attorney for Petitioners*
731 Washington Bldg.
Washington 5, D. C.

*Of Counsel*
SAVAGE, GIBSON, BENEFIELD & SHELTON
Liberty Bank Building
Oklahoma City, Oklahoma

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

# INDEX


| | Page |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Statute Involved | 2 |
| Questions Presented | 3 |
| Statement of the Case | 3 |
| Reasons for Granting the Writ | 6 |
| I. The Decisions of the Court Below Conflict with Applicable Decisions of this Court | 6 |
| II. The Decisions of the Court Below Conflict with Pertinent Decisions of the Circuit Courts of Appeals | 15 |
| III. The Decisions of the Court Below Are in Conflict | 18 |
| A. Full Recovery Allowed—*Earley* v. *United States* | 18 |
| B. No Recovery Allowed—*Sawyer* v. *United States* | 19 |
| C. Partial Recovery Allowed for Actual Physical Work—*Ahearn* v. *United States* | 20 |
| D. Both Full and Partial Recovery Disallowed | 21 |
| IV. Court Below Has Overlooked the Question of Night Differential Pay | 22 |
| V. The Case Involves an Important Question of Federal Law Which Has Not Been but Should Be Decided by this Court | 24 |
| Conclusion | 25 |
| Appendix | 1a |


## Table of Cases


*Ahearn* v. *United States*, No. 332-55, C. Cls. May 7, 1958 ..... 2, 7, 20, 21, 22

*Armour & Co.* v. *Wantock*, 323 U.S. 126, (1944) ..... 7, 8, 11, 12, 14, 17, 18, 22, 24

*Asaro* v. *United States*, No. 266-56, C. Cls. March 5, 1958 ..... 2, 7

*Bell* v. *Porter*, 159 F. 2d 117 (7th Cir. 1947); cert. den. 330 U.S. 843 (1947) ..... 17

*Bowers* v. *Remington-Rand*, 64 F. Supp. 620 (S.D. Ill. 1946); cert. den. 330 U.S. 843 (1947) ..... 17

Page

*Bridgeman v. Ford, Bacon & Davis*, 161 F. 2d 962 (8th Cir. 1947) ..... 17
*Campbell v. Jones & Laughlin*, 70 F. Supp. 996 (W.D. Pa. 1947) ..... 17
*Central Missouri Telephone Co. v. Council*, 170 F. 2d 641 (8th Cir. 1948) ..... 14, 24
*Chicago, R. I. & Pacific Ryw. Co. v. United States*, 253 F. 555 (8th Cir. 1918) ..... 8, 14, 24
*Collins v. United States*, No. 141-56, C. Cls. March 5, 1958 ..... 2, 7
*Conn v. United States*, 107 C. Cls. 422, 68 F. Supp. 966 (1944) ..... 11
*England v. United States*, 133 C. Cls. 768 (1956) ..... 2, 14, 18
*Farley v. United States*, 133 C. Cls. 776 (1955) ..... 1, 14, 18, 19, 20, 21
*Gaetke v. United States* 136 C. Cls. 756, 145 F. Supp. 913 (1956) ..... 2, 14, 19, 21
*General Electric Co. v. Porter*, 208 F. 2d 805 (9th Cir. 1954) ..... 14, 15, 16, 24
*Glen L. Martin Nebraska Co. v. Culkin*, 197 F. 2d 981 (8th Cir. 1952) ..... 14, 16, 24
*M. K. & T. Railway Co. v. United States*, 231 U.S. 112, (1913) ..... 8, 24
*McLaughlin v. Todd & Brown, Inc.*, 7 WH Cases 1014, 15 Labor Cases, Par. 64606 (N.D. Ind.) ..... 17
*Rokisf v. Day & Zimmerman*, 157 F. 2d 734 (8th Cir. 1946) ..... 17
*Sawyer v. United States*, 139 C. Cls. 837 (1957) ..... 2, 19, 21
*Skidmore v. Swift & Co.*, 323 U.S. 134, 137, (1944) ..... 6, 7, 13, 14, 17, 18, 22, 24
*Winsberg v. United States*, 120 C. Cls. 511 (1951) ..... 19
*Wright v. United States*, No. 232-57, C. Cls. January 14, 1959 ..... 20

STATUTES:

Federal Employees Pay Act of 1943, 57 Stat. 75 ..... 16
Federal Employees Pay Act of 1945, 59 Stat. 295, as amended, 5 U.S.C. 911, 921 ..... 2, 3, 10, 22, 23
Federal Employees Pay Act of 1954, 68 Stat. 1111 ..... 16

MISCELLANEOUS:

Federal Personnel Manual, Z-1 Sec. 25, 211 (a) ..... 15
House Report No. 726, 79th Congress, 1st Session ..... 23
Wage & Hour Interpretative Bulletin (Part 785) ..... 13

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

No.

MERLIN M. ARMSTRONG, ET AL., *Petitioners*

v.

THE UNITED STATES, *Respondent*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

*To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Claims in this case.

## OPINIONS BELOW

The opinion of the Court of Claims (Appendix A, *infra*, pp. 1a-28a) is not officially reported. The reported opinions of the Court of Claims in companion cases are as follows: *Farley* v. *United States*, 134

C.Cls. 776 (1955); *England* v. *United States*, 133 C.Cls. 768 (1956); *Gaethe* v. *United States*, 136 C.Cls. 756, 145 F.Supp. 913 (1956), and *Sawyer* v. *United States*, 139 C.Cls. 837 (1957). The unreported companion opinions of the Court of Claims are as follows, and slip opinions have been lodged with the Clerk of this Court: *Ahearn* v. *United States*, No. 332-55, C.Cls., May 7, 1958; *Autry* v. *United States*, No. 266-56, C.Cls., March 5, 1958, and *Collins* v. *United States*, No. 141-56, C.Cls., March 5, 1958.

## JURISDICTION

The judgment of the Court of Claims was entered on January 14, 1959. A timely petition for rehearing was denied by that Court on April 8, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. Sections 1255(1) and 2101 (*e*). The Court of first instance obtained jurisdiction under 28 U.S.C. Section 1491.

## STATUTE INVOLVED

Federal Employees Pay Act of 1945, effective July 1, 1945, 59 Stat. 295, as amended, 5 U.S.C. 911, 921 provides:

> "TITLE II—COMPENSATION FOR OVERTIME
>
> "Overtime Pay
>
> "SEC. 201. Officers and employees to whom this title applies shall, in addition to their basic compensation, be compensated for all hours of employment, officially ordered or approved, in excess of forty hours in any administrative work week, at overtime rates, as follows . . ."

"TITLE III—COMPENSATION FOR NIGHT AND HOLIDAY WORK?

"Night Pay Differential

"SEC. 301. Any officer or employee to whom this title applies who is assigned to a regularly scheduled tour of duty, any part of which, including overtime, falls between the hours of 6 o'clock postmeridian and 6 o'clock antemeridian, shall, for duty between such hours, excluding periods when he is in leave status, be paid compensation at a rate 10 percentum in excess of his rate of basic compensation for duty between other hours: *Provided,* That such differential for night duty shall not be included in computing any overtime compensation to which the officer or employee may be entitled: *And provided further,* That this section shall not operate to modify the provisions of the Act of July 1, 1944 (Public Law 394, 78th Congress), or any other law authorizing additional compensation for night work."

## QUESTIONS PRESENTED

1. Can the Federal Government keep its employees on the job overnight—8 hours—without pay or any consideration whatever?

2. If the answer to question number one is "yes", are plaintiffs nevertheless entitled to recover for hours of actual work performed and the interruptions during their so-called eating hours and night hours?

3. Are plaintiffs entitled to full night differential pay for all hours of duty between 6 p.m. and 6 a.m.?

## STATEMENT OF THE CASE.

Plaintiffs are employees of the United States Government stationed at Tinker Air Force Base, headquarters of the Western Defense System of the United

States and the largest air depot in the United States Air Force carrying on the major overhaul and modification work of the Air Force.

The base operated 24 hours daily for aircraft take off and landing, and its mission of servicing, repairing and modifying aircraft was carried out by three 8-hour shifts of personnel engaged 24 hours a day at all times during the period of claim, so that the base was in continuous activity day and night.

Plaintiffs were assigned to the Fire Protection and Aircraft Crash Rescue Branch as firefighters. They were officially ordered to be on the job 60 hours a week and 72 hours a week, as the case might be, for the entire period of their claim. They were on duty 24 hours and off duty 24 hours.

In the 60-hour week, they were not paid for 20 hours of time on the job and in the 72-hour week, they were not paid for 24 hours. They received no time off or other privileges for this extra work.

Neither were plaintiffs paid the 10% night differential for the 8 night hours of duty in accordance with Sec. 301 of the statute.

Plaintiffs were officially ordered to be on duty in the confines of the fire station at all times. They could not eat at the base cafeteria, but had to prepare their own food. They could not have visitors.

The findings of the Court below show:

1. "When plaintiffs were employed, it was understood that there would be no distinction between the hours of the day and night and no specific time was set aside for the carrying on of any personal activities such as sleeping or eating. Plaintiffs responded to any

and all calls occurring at night in the same manner as during the daytime" (F. 16).[1] There was no Air Force or Base regulation providing for sleeping and eating time.

2. Plaintiffs were skilled and trained in aircraft crash rescue and firefighting of the kind required at an active air base, combining constant flying operations and heavy aircraft industrial activity. (F. 6)

3. Much of the plaintiffs' work is of an extremely hazardous nature. (F. 12)

4. "The firefighting equipment utilized at the base is especially designed for Air Force use. It is complicated and represents an investment of over one-quarter million dollars. It is not the type of equipment often associated with municipal or institutional structural firefighting. The firefighters are the only persons on the base who have operating responsibility for this equipment. Extensive periods of training are required for proficiency in operation." (F. 9).

5. Plaintiffs were responsible for a wide range of work and "no other personnel was responsible, trained or authorized to carry out these functions . . . In the event of the absence or inability of the firefighters . . . the necessary protection and service would not be available." (F. 10)

6. The base operated 24 hours daily for flying and industrial operations. "Thus it was necessary for all plaintiffs to be available for duty all hours of the night or the function of the base would not be adequately performed. Plaintiffs were subject to call throughout the night hours for the same type of work as through the day hours." (F. 11)

---

[1] "F" denotes "Finding".

7. "The general nature and activity of the air base operations over the period of a 24-hour day, is such that there is no distinction from hour to hour and no distinction between any hour insofar as plaintiff's responsibilities for responding to all calls and demands is concerned.", (F. 14)

8. "The night hours, like the day hours, required a constant 'watch' which was rotated among plaintiffs so that on each tour they served watch time once during the day hours and once during night hours." (F. 11)

The Court below denied any compensation for employment during the night hours and any compensation for employment over 16 hours per day.

## REASONS FOR GRANTING THE WRIT

### I.

### THE DECISIONS OF THE COURT BELOW CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

The Court below has been lulled by a righteous-sounding phrase—time spent in sleeping and eating should not be paid for—without considering the test laid down by the United States Supreme Court in *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 137 (1944), as follows:

> "Facts may show that the employee was engaged to wait or they may show that he waited to be engaged. His compensation may cover both waiting and task or only performance of the task itself. Living quarters may in some situations be furnished as a facility of the task and in another as a part of its compensation. The law does not impose an arrangement upon the parties. It imposes upon the courts the task of finding what the arrangement was."

Instead, the Court has limited its scrutiny and findings to the question of whether there was actual physical labor performed during night hours when sleep was permitted, subject to call, and during which calls were answered. On this basis it has reached a conclusion of law in its thinking which precludes waiting time from being working time.[1] Such a conclusion of law is in conflict with the decision of the Supreme Court in *Skidmore v. Swift, supra:*

> "For reasons set forth in the Armour case, 323 U.S. 126, 65 S. Ct. 165, decided herewith, . . . we hold that no principle of law found either in the statute or in court decisions precludes waiting time from also being working time."

The Supreme Court, in speaking of the action of the lower court in that case, stated:

> "Its evaluation and inquiry were apparently restricted by the notion that waiting time may not be work, an understanding of the law which we hold to be erroneous."

Thus the Court of Claims restricts its evaluation and inquiry by the notion that 'sleeping' and eating time may not be work, contrary to the opinion of the United States Supreme Court.

The fact that actual physical labor was not performed is not the test laid down by the Supreme Court. To the contrary, the Supreme Court has said:

> "Of course, an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for

[1] The Court has now recently expressed this conclusion in *Arary v. United States*, No. 266-56, C. Cls. March 5, 1958 and *Collins v. United States*, No. 141-56, C. Cls., March 5, 1958, both motions for summary judgment, then in *Ahearn v. United States*, No. 332-55, C. Cls., May 7, 1958, and now in the case at bar.

> something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity. Readiness to serve may be hired quite as much as service itself and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer." *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944).

Therefore, the Court below, in failing to recognize the principles laid down by the Supreme Court in *Armour & Co. v. Wantock*, *supra*, and by making the test one of actual physical labor, is in conflict. Such a conflict requires resolution by the Supreme Court.

The Court below has failed to consider the arrangement between the parties and that the time spent by plaintiffs during the night on the job was for the employer's benefit. The plaintiffs were arbitrarily ordered to stay on the job 20 hours or 24 hours per week[2] *more* than other employees working side-by-side with them, without pay, without any special agreement authorizing the additional hours above the basic 40 hour week, and without any consideration whatsoever.

---

[1] That inactive duty may be duty nonetheless is not a new principle invented for application to this Act. *M. K. & T. Railway Company v. U. S.*, 231 U.S. 112, 119 (1913):

> "But they were under orders, liable to be called upon at any moment and not at liberty to go away. They were nonetheless on duty whether inactive. Their duty was to stand and wait."

See also, *Chicago, Rock Island & Pacific Railway Co. v. United States*, 253 Fed. 553 (1918).

[2] Twenty hours per week additional was required if the tour of duty was 60 hours and 24 hours additional was required if the tour was 72 hours. Plaintiffs worked both tours of duty.

Plaintiffs' services were required all hours of the night or the function of the base would not be adequately performed and the necessary protection and service would not be available. The base would have had to shut down. The arrangement was for the employer's benefit for which it paid no compensation to the employees.

The fact is, this case involves a clever device by which the Government has succeeded in getting 8 hours free service per day at the expense of the employee, for if the plaintiffs had not been on the job, the Government would have had to employ someone else to be there in their place and to pay them. The plaintiffs are likewise entitled to be paid.

When plaintiffs were employed, it was understood that there would be no distinction between the hours of the day or night and no specific time was set aside for the carrying on of any personal activities such as sleeping or eating. There was no discussion at the time of employment regarding hours for sleeping.

The Headquarters Office Instruction governing plaintiffs' hours of duty provided: "The tour of duty for firefighters will consist of 24 hours on duty and 24 hours off duty."

There was no Base regulation or Department of the Air Force Regulation that authorized or prescribed any time for sleeping and eating for plaintiffs. There was no arrangement to pay plaintiffs for any actual physical labor performed during night hours and they were not paid for any such labor. Thus they were not waiting to be engaged and then compensated, but were engaged to wait and thus entitled to compensation for their waiting time. If the intention was to provide

compensation for hours of physical effort only, then they would have been engaged as Wage Board or hourly employees, but this was not the case; the Congress provided for their classification and pay as per annum employees. They were employed for regular, fixed tours of duty, 24 hours per day.

The 1945 Federal Employees Pay Act, 59 Stat. 295, applicable in this case, provides overtime pay for all hours of employment in excess of 40 per week. Plaintiffs are classified employees and are subject to specific coverage of the overtime pay provision. None of the numerous exceptions contained in the Act apply to plaintiffs. It should be noted the Act, in addition, provides for special overtime arrangements for certain categories of employees, but not plaintiffs. The Act makes no mention of sleeping or eating time for employees. Neither is there reference to any special treatment of eating or sleeping time in the hearings, reports or debates of the Congress on this legislation.[1]

It should be noted that the predecessor Pay Act of 1943 (57 Stat. 75) provided compensation for this type of overtime work by giving premium compensation. The successor Pay Act of 1954 (68 Stat. 1111) likewise gave premium compensation for overnight duty. However, the 1945 Act which is applicable here did not provide for premium pay, but did give overtime pay on a diminishing scale of hours of employment above 40 per week. The courts must follow the act, and if there is to be variation, then the Congress should do the amending.

---

[1] Subsequent legislation, years later, differentiates between sleeping and eating time, but that action cannot be related back to the 1945 Federal Employees Pay controlling in this case or be construed as writing its legislative history.

The defendant has advanced *Conn* v. *United States*, 107 C.Cls. 422, 68 F.Supp. 966 (1946), as an argument for not paying employees for working overnight. That case was decided under an entirely different statute which provided premium pay for overnight work and the court found plaintiffs were properly paid for their night work under the premium pay proviso which is not included in the statute applicable to the case at bar.

The defendant has heretofore cited *Gaethe* v. *United States*, 136 C.Cls. 756, 145 F.Supp. 913 (1956), but ignores the existence of a written contract between the employer and employees in that case which excepted time allowed for sleeping and eating from payment. Of this contract the Court said: "The contract between the employees and the railroad was a sensible and realistic application of the statute to the peculiar requirements of plaintiffs' jobs", and as a consequence, there was no obligation on the part of the railroad to pay. There was no such contract in the case at bar.

The Court below refers to *Armour & Co.* v. *Wantock*, *supra*, as authority "for the right of the employee to recover compensation for standby time that does not include eating, and sleeping time." Technically correct, the statement nevertheless gives the impression that this Court ruled against compensation for sleeping and eating time so it must be emphasized that the question of pay for nighttime hours or eating hours was not presented to the Supreme Court and the Court did not pass on it. The governing statute in that case was the Fair Labor Standards Act and its wording and purport with respect to overtime is almost identical with the statute in the case at bar."

It should be noted that all cases to date have followed the general rule that daytime waiting may be employment time. The instant case is no exception. The waiting time in all of these cases included time in which the employee was doing nothing, or during which he was engaged in some form of recreation to while away the time or perhaps even sleeping as he was not ordered to physically labor by his superiors. This disposition of his time was not of his choice but was brought about for the convenience and benefit of his employer who needed his presence. Therefore, for the lower court to say that an employee can be paid under the statute for idleness or time spent in playing dominoes, but not for time when he is officially ordered to be on duty and is allowed to sleep because there is no physical work to be done, although he is subject to calls and responding to calls, is inconsistent.

> "Inconsistency is at once suggested when a distinction is made between an employee . . . who is subject to call but who is sleeping, and one who is subject to call and is listening to the radio or playing solitaire . . . It is perhaps true that Congress did not visualize a case of this kind when the Act was passed. If this be a sound premise we suggest without temerity, and we hope without appearing immodest, that it would be highly appropriate for Congress to amend the act: Surely courts *cannot*, or it might be more correct to say, should not do the amending." (*Armour & Co. v. Wantock*, 140 F.2d 357 aff'd, 323 U.S. 126.)

We respectfully note the Court below refers to an old, inapplicable Wage and Hour Division Interpretative Bulletin of the Department of Labor as authority and ignores the current applicable bulletin which provides directly the opposite.

The Court below quotes a portion of the Supreme Court decision in *Skidmore* v. *Swift & Co., supra,* which seems to imply that the Supreme Court leaned to the position taken by the Wage and Hour Division of the Department of Labor.

However, directly the opposite position is taken in the current interpretative bulletin[1] taking the place of the interpretation existing at the time of the decision in *Skidmore* v. *Swift & Co., supra.* It provides directly the opposite with reference to sleeping time, as follows:

In Section 785.3 d—

> "Under certain conditions an employee is considered to be working even though some of his time is spent in sleeping or in other activities."

And in footnote 22, the Bulletin states as follows:

> "Where no expressed or implied agreement to the contrary is present the 8 hours of sleeping time and lunch periods constitute hours worked. *General Electric Company* v. *Porter*, 208 F.2d 804 (C.A. 9), certiorari denied, 347 U.S. 975."

With respect to eating time, the current Bulletin provides:

> "The employee must be completely relieved from duty for the purpose of eating regular meals or the mealtime will be considered working time.
>
> "The employee is not relieved if he is required to perform any duties whether active or inactive while eating; for example, the office employee who is required to eat at his desk . . ." (785.3 d)

[1] Wage and Hour Interpretative Bulletin (Part 785).

Thus the Department of Labor has taken the position that sleeping time on the job in the absence of an agreement to the contrary, is working time and that mealtimes on the job are likewise working times.

The Court below states in its decision that since the decisions in *Armour & Co.* v. *Wantock*, *supra*, and *Skidmore* v. *Swift & Co.*, *supra*, employees have been denied compensation for time spent in sleeping and eating. We respectfully note that the Court below recognized sleeping and eating time as being compensable in *Farley* v. *United States*, 131 C.Cls. 776 (1955) and in *England* v. *United States*, 133 C.Cls. 768 (1956) on the ground that:

> ". . . Freedom of choice to follow her own habits was restricted for the benefit of defendant . . ."

Also, in *General Electric Company* v. *Porter*, 208 F.2d 805 (9th Cir. 1954), allowing compensation for eating and sleeping time, the Court said:

> "Considering the nature of the services performed by the firemen we conclude that the firemen were engaged to wait; that their compensation covered both waiting and task and that the living quarters were furnished as a facility of the task."

Cf. *Central Missouri* v. *Conwell*, 170 F.2d 641, 648 (8th Cir. 1948); *Chicago, Rock Island & Pacific Railway Company* v. *United States*, 253 Fed. 555, 556 (8th Cir. 1918); and *Glen L. Martin Nebraska Co.* v. *Calhoun*, 197 F.2d 981 (8th Cir. 1952).

The Court below places reliance on a regulation of the United States Civil Service Commission which provides for payment of only the daytime hours of employees. The Congress did not repose in the Com-

mission the authority to promulgate regulations contrary to law. We furthermore feel that it is inconsistent to cite a violator of the law as authority for his own violation.

Furthermore, the very regulation of the Commission relied upon specifically provides:

> "The regularly scheduled administrative work week shall be the total number of regularly scheduled hours of duty per week, including all stand-by time except that allowed for sleep and meals by regulations of the departments." (Federal Personnel Manual, Z-1, Section 25.211 (e)).

No regulations of the Department prescribed time for sleep and meals. Thus the administrative work week in the case at bar was a full 60 hours or 72 hours, as the case might be.

## II.

## THE DECISIONS OF THE COURT BELOW CONFLICT WITH PERTINENT DECISIONS OF THE CIRCUIT COURTS OF APPEALS

The decisions and reasoning of the Court of Claims in the present case is in conflict with the decision of the Ninth Circuit Court of Appeals in *General Electric v. Porter, supra.* In that decision, the Circuit Court of Appeals found that sleeping time of firefighters was working time.

> "Considering the nature of the service performed by the firemen, we conclude that the firemen were engaged to wait; that their compensation covered both waiting and task, and that the living quarters were furnished as a facility of the task. As previously stated, the firemen were required to remain at the station for the entire twenty-four hour shift ready to answer alarms at any hour of

> the day or night. They were as completely under the direction of General Electric during the eight-hour sleeping period as during the other sixteen hours of the shift. They were on the employer's premises at night primarily for the benefit of General Electric, and as the only effective means to provide twenty-four hour protection for the communities of Richland and North Richland. During the hours that they were at the fire station they were not free to do as they would. The sleep allowed was a fitful one at best, which might be said to have been with one eye open in anticipation of the moment they would be called upon to jump to the response of an alarm. The trial court found that the sleeping facilities provided were adequate. We may consider that finding as not being clearly erroneous. That fact in itself is not determinative as to the compensability of the sleeping time. It would be of importance in the case of an agreement that sleeping time would not be considered work time."

In the case at bar, with almost identical facts, and no distinguishable differences of basic fact and law, the Court of Claims held the opposite, i.e., that sleeping and eating time could not be working time because no physical labor was being performed.

The present decision is likewise in conflict with the decision and reasoning of the Eighth Circuit Court of Appeals in the case of *Glen L. Martin Nebraska Company* v. *Calkin*, 197 F.2d 981, 984 (1952), cert. den. 344 U.S. 866 (1952), as follows:

> "Much emphasis is placed by defendant upon the fact that only in comparatively few instances did the evidence show that guards or firemen were required to answer calls for fires or to quell disturbances during the 30 minute period in question. But the question was not so much whether the

guards and firemen were actually regularly called upon to put down overt acts of violence, sabotage, disturbances, or to put out fires during the 30-minute period, *as it was whether they were performing their regular duties during that period and were then substantially performing the duties assigned to them by their employer and were not free to follow pursuits of a purely private nature.*" (Emphasis supplied)

Cf. *Armour* v. *Wantock*, 323 U.S. 126 (1944); *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944); *Bowers* v. *Remington Rand*, 64 F. Supp. 620 (S.D. Ill. 1946); aff'd. 159 F.2d 114 (7th Cir. 1946), cert. den. 330 U.S. 843 (1947); *Bell* v. *Porter*, 159 F.2d 117 (7th Cir. 1957), cert. granted 330 U.S. 817, grant of cert. vacated and cert. den. 330 U.S. 813, reh. den. 331 U.S. 864 (1947); *Roley* v. *Daly & Zimmerman*, 157 F.2d 734 (8th Cir. 1946); *Bridgeman* v. *Ford, Bacon & Davis*, 161 F.2d 962 (8th Cir. 1947); *McLaughlin* v. *Todd & Brown, Inc.*, 7 W.H. Cases 1014; 15 Labor cases, par. 64606 (N.D. Ind.); See also: *Campbell* v. *Jones & Laughlin*, 70 F. Supp. 996 (W.D. Pa. 1947).

We respectfully note that the lower court cites *Bowers* v. *Remington Rand*, *supra*, and *Bell* v. *Porter*, *supra*, as holding against compensation for hours during which sleeping and eating on the job were permitted. In these cases the Court specifically found that there were express agreements or contracts between the employees and the employers exempting such time from working time. In the case at bar there was no such agreement.

## III.

## THE DECISIONS OF THE COURT BELOW ARE IN CONFLICT

The Court below has handed down four conflicting decisions in cases involving essentially the same facts and the same statutory provisions as those in the case at bar. The Court made no distinction between those cases with regard to special circumstances or reasoning that might be involved. These cases are as follows:

### A. Full Recovery Allowed— Farley v. United States

The Court found in *Farley v. United States*, 131 C. Cls. 776 (1955), that all hours of duty above the basic 40-hour work week officially required, including sleeping time, were compensable at overtime rates. The Court said:

> "In these circumstances, we cannot escape the conclusion that the correctional officer was on duty. The order itself stipulated that the officer should 'remain on duty'. Her freedom of choice to follow her own habits was restricted for the benefit of the defendant . . ."

Cf. *England v. United States*, 133 C.Cls. 786 (1956). In these cases the court below followed the decisions of the Supreme Court in *Armour v. Wantock*, *supra*, and *Skidmore v. Swift & Co., supra*.

The decision in the instant case finds the Court below reasoning that its decisions in the *Farley* and *England* cases allowed compensation for night time spent in sleeping because substantial labor was performed during the time set apart for sleeping and eating. However, the decision was based upon a restriction of freedom of plaintiff's choice to follow her own habits for the benefit of the defendant as stated above, and nowhere in the

decision was the reasoning based on "substantial labor." In fact, the only evidence concerning nighttime work before the court was the uncorroborated testimony of the plaintiff herself, unsupported by logs, records or any other evidence. The court found the evidence in the *Farley* case showed that at 9:30 p.m. the lights were turned out, and the plaintiff expressly permitted to go to sleep in a private room used by her exclusively, and that she was not required to engage in active duty except on rare occasions. She was not required to have any sort of watch. The case at bar presents a far more substantial claim to the description "substantial labor" performed during night hours.

**B. No Recovery Allowed—**
**Sawyer v. United States**

*In Sawyer v. United States*, 139 C. Cls. 837 (1957), the Court held directly the opposite without comment, and denied any recovery for night hours of duty, although the surrounding circumstances presented an even stronger set of facts to support a decision in line with *Farley v. United States, supra*.[1]

---

[1] The *Sawyer* case presents a still further conflict or a conflict within a conflict, as it was decided "on the authority of our opinion in the *Gaetke* case . . ." (*Gaetke v. U. S., supra.*) These two cases are not comparable. In the *Gaetke* case the court below found the arrangement between plaintiff and defendant was embodied in a formal contract negotiated by plaintiffs' union which "was a sensible and realistic application of the statute to the peculiar requirements of plaintiffs' jobs." The contract was fulfilled. There was no contract in the *Sawyer* case.

In the *Gaetke* case, the Court cited *Winsberg v. United States*, 120 C. Cls. 511 (1951), which was based on a different statute containing a proviso for compensatory time off for overtime, which was granted, and which the Court found to be adequate compensation under the law. There was no compensatory time off or other benefit granted plaintiffs in the *Sawyer* case or the case at bar.

The reasoning of the *Farley* case was not followed, i.e., even though plaintiff's "freedom of choice to follow [her] own habits was restricted for the benefit of the defendant", as in *Farley*. The Court ignored such reasoning.

**C. Partial Recovery Allowed for Actual Physical Work—Ahearn v. United States**

In a third decision falling between the two previous extremes, the Court below, in similar circumstances, gave recovery for physical labor performed during night hours and meal times, but granted set-off for time above 8 hours during which meals might be eaten or sleep allowed. *Ahearn* v. *United States*, No. 332-55, C.Cls. May 7, 1958.

The *Ahearn* decision is further confused by a more recent decision, *Wright* v. *U. S.*, No. 232-57, C.Cls. January 14, 1959, wherein the Court held: "Compensation for 2 3's of the 24 hours plaintiffs were on duty seems to us to be a sensible construction of the Federal Employees Pay Act of 1945 (59 Stat. 295)." Thus the Court has said in the *Wright* case that all time but 8 hours allowed for sleeping and eating are compensable—16 hours; and in the *Ahearn* case that all hours of actual physical labor performed during the 8 hours allowed for sleep are compensable—but if plaintiffs' permissive sleeping time might have been more than 8 hours, then such excess hours could be used to offset the hours of physical labor performed during hours allowed for sleep. The effect is to allow one legitimate claim to offset another legitimate claim. This cannot be reconciled.

**D. Both Full and Partial Recovery Disallowed**

The fourth and latest decision by the Court below is in the case at bar wherein the immediately preceding decision of the Court in this line of cases, *Ahearn* v. *United States, supra,* which allowed recovery for hours actually physically labored at night was not followed, even though there was a finding of actual physical labor being performed at night.

It should be noted that the trial in the case at bar, as in the *Ahearn* case, was limited by stipulation to the question of liability, the question of any liability to be determined by a further proceeding pursuant to Rule 38, U. S. Court of Claims. It would seem consistent for the Court to follow its decision in the *Ahearn* case as actual physical labor was performed at night, but the instant decision overruled the *Ahearn* case.

These cases all involve the construction of Sections 201 and 301 of the 1945 Federal Employees Pay Act. In each case plaintiffs were United States employees and were ordered to be on the job either 60 or 72 hours per week. The freedom of all was restricted for the benefit of the Government, defendant. In only one case, *Gaetke* v. *United States, supra,* was there a special agreement excluding night hours and meal times from employment time. Yet the decisions went off in different directions.

In *Farley* the Court based its decision on the restriction of plaintiff's freedom.

In *Gaetke* the decision was based on a special contract.

*Sawyer* was decided on the authority of *Gaetke*, although there was no special contract involved.

The *Ahearn* decision was predicated on the performance of some actual physical labor.

In the case at bar, the court undertook to construe what the Congress intended by use of the word employment and came into conflict with the decisions of the Supreme Court[1] as well as its own previous decisions.

There is thus no legal guide line for litigants to follow.

There is no possibility that these divergent holdings can be harmonized in the Court below. Each identical new case has brought a different decision without establishing any foundation in law. The matter is in dispute and will remain so until settled by the Supreme Court.

## IV.
## COURT BELOW HAS OVERLOOKED THE QUESTION OF NIGHT DIFFERENTIAL PAY

Plaintiffs' petition to the Court below seeks recovery for night differential, as provided by statute, for all hours of duty between 6 p.m. and 6 a.m.

The Federal Employees Pay Act of 1945 provides:

> "Title III. Sec. 301:
>
> "Any officer or employee to whom this title applies who is assigned to a regularly scheduled tour of duty, any part of which falls between the hours of 6 o'clock post meridian and 6 o'clock antemeridian, shall, for *duty* between such hours, excluding periods when he is in a leave status, be paid compensation at a rate 10 per centum in excess of his basic rate of compensation for duty between other hours * * *." [Emphasis supplied]

[1] *Armour & Co. v. Wantock, supra, Skidmore v. Swift & Co., supra.*

The Headquarters Office Instruction governing plaintiffs' hours of *duty* provided, "The tour of duty of firefighters will consist of 24 hours *on duty* and 24 hours *off duty*." (Emphasis supplied)

During the period of their claim plaintiffs' official work day consisted of 24 hours beginning at 8 a.m. and ending the following day at 8 a.m.

Being on duty regardless of what kind of duty or what they were doing brings them under Section 301 of the Act and therefore entitled to the full night differential provided by law. The law does not say "labor", "work", "employment", but "duty".

House Report No. 726, 79th Congress, 1st Session, covering the 1945 Pay Act clearly recites the reason for night differential pay on page 13 as follows:

> "The objective of providing a night differential is to compensate employees for working at undesirable hours and in some measure for the dislocation and disruption of their living habits which result from such work."

It is hardly necessary to add that the facts show plaintiffs to be within this intendment of Congress as they both worked at night and had their living habits and home life disrupted by their confinement at the Base for the convenience of the Government.

Notwithstanding, the Court below nowhere gave consideration to the question of night differential pay. Its opinion was devoted solely to overtime pay which is covered by an entirely different section of the statute. Its opinion was in a large measure directed toward a definition of the word "employment" as used in Title III, Section 201 of the statute. Its conclusion as to the

meaning of employment was contrary to the decisions of the United States Supreme Court as cited in Section I hereof. It did not consider the application of Section 301. Plaintiffs are entitled to a decision on that point as well as the question of overtime.

## V.

### THIS CASE INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE DECIDED BY THIS COURT

This case involves the proper treatment of employees of the United States Government through the correct application of principles laid down by the Congress. The policies followed by the Federal Government should set the standard and serve as a model for private business. It is, therefore, imperative that its decisions embody a correct application of the law. Not only should the law be correctly applied, but there should be no distinction between the treatment accorded private industry and Government employees under similar statutes, such as now exist.[1]

Furthermore, there should be a clear enunciation of principle consistent with the decisions of the Supreme Court in *Armour & Co.* v. *Wantock*, *supra*, *Skidmore* v. *Swift & Co.*, *supra*; cf. *M. K. & T. Ruy. Co.* v. *United States*, *supra*, and therefore, the present conflicts and confusion existing in the six decisions of the Court below should be resolved and clarified so the lawyer can have a stable basis on which to advise his clients.

---

[1] *General Electric* v. *Porter*, *supra*, awards full compensation to firefighters for all night duty. The Court below denies any compensation. See also discussion in Section II hereof. *Cf. M. K. & T. Railway Co.* v. *U. S.*, *supra*; *Central Mo.* v. *Connell*, *supra*; *Chesa. R. I. & Pac. Ruy.* v. *U. S.*, *supra*, and *Glen L. Martin Neb. Co.* v. *Culkin*, *supra*.

As of this date the Court below has 101 cases, presenting this precise question, pending before it. Involved are 2655 plaintiffs. Thus it can readily be seen the Supreme Court should decide the question to eliminate the impasse now confronting both the Court and plaintiffs.

## CONCLUSION

The variety of decisions handed down by the Court below without reconciliation and based on identical facts have placed Federal Civilian employees and their attorneys in such a state of uncertainty that they do not know on what basis to proceed. These decisions are in conflict with applicable decisions of the United States Supreme Court. In addition, the conflict of opinions in the circuit Courts of Appeal further compounds the confusion. This utter confusion requires the clarifying wisdom of this Court and for that reason this petition for a writ of certiorari should be granted.

Respectfully submitted,

DONALD S. DAWSON
*Attorney for Petitioners*
731 Washington Bldg.
Washington 5, D. C.

*Of Counsel*
SAVAGE, GIBSON, BENEFIELD & SHELTON
Liberty Bank Building
Oklahoma City, Oklahoma

July 6, 1959

## APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 145-56

(Decided January 14, 1959)

MERLIN M. ARMSTRONG, ET AL., v. THE UNITED STATES

*Mr. Donald S. Dawson* for plaintiffs. *Mr. Lloyd Benfield* was on the briefs.

*Mr. Kendall M. Barnes*, with whom was *Mr. Assistant Attorney General George Cochran Doub*, for defendant. *Messrs. Thomas J. Lydon* and *Cyril Moscow* were on the brief.

OPINION

WHITAKER, *Judge*, delivered the opinion of the court:

This case, brought by some 88 firefighters at the Tinker Air Force Base at Oklahoma City, Oklahoma, involves their right to compensation for the time they were required to spend on the employer's premises, subject to call, but during which they were permitted to eat or sleep.

The case arises under the Federal Employees Pay Act of 1945 (59 Stat. 295), and, for a portion of the period, under the amendment thereof on September 1, 1954, designated the Premium Pay Act (68 Stat. 1111; 5 U. S. C. 926).

1. Section 201 of the Federal Employees Pay Act of 1945 reads, in part, as follows:

> Section 201. Officers and employees to whom this title applies shall, in addition to their basic compensation, be compensated for all hours of employment, officially ordered or approved, in excess of forty hours in any administrative work week, at overtime rates, as follows * * *.
>
> [For employees receiving compensation of less than $2980 per annum, the overtime was one and one-half

times the basic hourly rate of compensation, but, as the basic salary increased, the percentage of the basic rate for overtime decreased.]

The basic question presented is what Congress meant by the words, "hours of employment." Did it intend to include therein time during which an employee was required to remain on the employer's premises but during which he could eat or sleep?

The first cases to reach the courts, in which the meaning of the words was in issue, were *Wantock* v. *Armour & Co.*, 140 F. 2d 356; 323 U. S. 126; and *Skidmore, et al.* v. *Swift & Co.*, 136 F. 2d 112; 323 U. S. 134. They involved claims of firefighters for compensation for all the time they were required to remain on the employer's premises in a standby status, including sleeping and eating time. They arose under the Fair Labor Standards Act, but this Act, as also the Federal Employees Pay Act, required overtime pay for "employment" beyond a certain number of hours. In both cases the employees claimed that all standby time should be included in hours of employment, even though a part of it was spent in eating and sleeping. The employer claimed that, since no labor was performed in any standby time, the employee was not entitled to compensation therefor.

In *Wantock* v. *Armour & Co.*; *supra*, the District Court held that the employee was entitled to be paid for all standby time, except that spent in eating and sleeping. The employer appealed, but the employee did not. The Court of Appeals for the Seventh Circuit affirmed, 140 F. 2d 356, and the Supreme Court affirmed, 323 U. S. 126.

This case is authority for the right of the employee to recover compensation for standby time that does not include eating and sleeping time. His right to recover for eating and sleeping time was decided only by the District Court, which held he could not recover therefor.

In *Skidmore, et al.* v. *Swift & Co., supra*, the District Court held that the employees were not entitled to recover for any standby time, and the Court of Appeals for the Fifth Circuit affirmed, 136 F. 2d 112. On certiorari by the Supreme Court, the lower courts were reversed, 323 U. S. 134. The Supreme Court held that an employee might have the right to recover for standby time, depending on the facts of the particular case, and it remanded the case for findings of fact and for further proceedings. It did not specifically decide whether or not recovery could be had for time spent in eating and sleeping, but it clearly intimated that it could not be.

On pages 138-140 the Supreme Court summarizes Interpretative Bulletin 13 of the Wages and Hours Division, and discusses the weight to be given to it. After summarizing this bulletin the Supreme Court, at page 139, said:

> The facts of this case do not fall within any of the specific examples given, but the conclusion of the Administrator, as expressed in the brief amicus curiae, is that the general tests which he has suggested point to the exclusion of sleeping and eating time of these employees from the workweek and the inclusion of all other on-call time: although the employees were required to remain on the premises during the entire time, the evidence shows that they were very rarely interrupted in their normal sleeping and eating time; and these are pursuits of a purely private nature which would presumably occupy the employees' time whether they were on duty or not and which apparently could be pursued adequately and comfortably in the required circumstances; the rest of the time is different because there is nothing in the record to suggest that, even though pleasurably spent, it was spent in the ways the men would have chosen had they been free to do so.

It then discusses the weight to be given to the views of the Administrator, and concludes,

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. * * *

In conclusion it noted: "The courts in the *Armour* case weighed the evidence in the particular case in the light of the Administrator's rulings and reached a result consistent therewith."

Since these decisions, employees have been compensated for standby time, although no work was performed therein, but they have been denied compensation for time spent in sleeping and eating, although during that time they were subject to call. It has been generally understood that this was in accord with the clear intimation of the Supreme Court in the above cases, that an employee was not entitled to compensation for time spent in sleeping and eating, merely because such time was subject to possible interruptions.

This has been the uniform holding of our court, except in two cases where substantial labor was performed during the time set aside for sleeping and eating. *Winsberg* v. *United States*, 120 C. Cls. 511, under the Overtime Pay Act; *Gaeth* v. *United States*, 136 C. Cls. 756; *Collins* v. *United States*, No. 141-56, and *Avary* v. *United States*, No. 266-56, both decided on March 5, 1958; and *Ahearn et al.* v. *United States*, No. 332-55, decided May 7, 1958, all under the Federal Employees Pay Act.

In *Farley* v. *United States*, 131 C. Cls. 776, and in *England* v. *United States*, 133 C. Cls. 768, compensation was allowed because substantial labor was performed during the time set apart for sleeping and eating.

The Court of Appeals for the Seventh Circuit has been of the same opinion. In addition to *Wantock* v. *Armour & Co., supra*, see *Bowers* v. *Remington Rand*, 159 F. 2d 114, and *Bell* v. *Porter*, 159 F. 2d 117, decided after the Supreme Court's opinion in *Wantock* v. *Armour & Co., supra*.

The contract between the Alaska Railroad and its firefighters provided for overtime for standby time, except for eating and sleeping time, for which no compensation was to be paid. Of the total time spent on the employer's premises, two-thirds were compensable, and one-third, not compensable. In *Gaetke, et al.* v. *United States, supra*, we said that this voluntary agreement between employer and employee "was a sensible and realistic application of the statute [The Federal Employees Pay Act] to the peculiar requirements of plaintiffs' jobs."

Later, the Civil Service Commission, which by section 604 of the Federal Employees Pay Act, was given power to make regulations, promulgated a regulation of the same tenor as the contract in the *Gaetke* case, to wit, compensation for two-thirds of the time spent on the employer's premises, and no compensation for eating and sleeping time.

The Comptroller General approved payments made in accordance with the rule. 25 Comp. Gen. 161.

There is thus respectable authority for the exclusion of eating and sleeping time from compensable time spent on the employer's premises: first, the contract between employer and employee, involved in the *Gaetke* case; second, the Civil Service Commission regulation; third, the ruling of the Comptroller General; fourth, the decisions of the Court of Appeals of the Seventh Circuit, and of this court; and, fifth, the clear intimation of approval by the Supreme Court in *Skidmore* v. *Swift & Co., supra*. Lastly, we think Congress, in the Premium Pay Act of 1954, has given implied approval of the principle underlying the Civil Service regulation. That Act permits a maximum of 25

percent premium pay for standby time. Under the formula of the Civil Service Regulations a firefighter gets paid from 20 percent to 33⅓ percent for his standby time; he receives nothing for eating and sleeping time. (The variance in the percentage depends on his basic pay.)

If these employees are compensated in accord with the Civil Service Regulations and with our previous holdings, they will get approximately the same as what they would get under the Premium Pay Act of 1954.

Not only is this ruling supported by authority, it seems to us to be "a sensible and realistic application of the statute to the peculiar requirements of plaintiff's jobs." When Congress passed the Federal Employees Pay Act, we doubt it had in mind the peculiar situation of firefighters, but it does not seem to us reasonable to suppose it meant to compensate an employee merely because he was required to sleep and eat on the employer's premises instead of at home. This seems so even if he was subject to call during his sleeping and eating time, and if he was in fact called, provided that he was paid for all hours, except those during which he was actually free to eat and sleep.

We feel assured, therefore, that the regulation of the Civil Service Commission gives effect to the fundamental intent of Congress to fairly and justly compensate Federal employees for their services to the Government. We cannot believe that Congress meant to compensate them for time spent in sleeping on the job. If eight hours out of the 24 were allowed for sleeping and eating, these plaintiffs have been fully compensated.

What are the facts in this case?

Plaintiffs were on duty on alternate days for 24 hours a day, a total of 72 hours per week. For 40 hours plaintiffs were paid straight time, and for an additional 8 hours they were paid overtime at the statutory rate. For the balance

of the time, which was supposed to be devoted to eating and sleeping, they were paid nothing. Plaintiffs were not permitted to sleep during the daytime, but they were permitted to do so from 8 p.m. to 7 a.m., unless during that time some emergency prevented. As a matter of choice, however, many of the plaintiffs retired between 11 p.m. and midnight.

Logs were kept of emergency calls during the time set apart for sleep. These logs do not seem to be as accurate as we would like, but, such as they are, they show a total of about 266 interruptions during sleeping hours in 1954 for "emergency landings", "crash standby and fireguard", "gasoline wash down" and "false alarms", 208 for 1955, and 238 for 1956. All three stations had to respond to an emergency landing alarm. Each such alarm consumed about 20 minutes. There were an average of about 50 per year. Thus approximately 17 hours per year were consumed in answering such alarms. The other alarms consumed from 15 to 30 minutes. Ordinarily only a part of the men from one station answered the other alarms. The average number per year was about 190, or something over 60 per station. If we allow 30 minutes for each alarm, this means 30 hours per year. At a maximum, not more than 50 hours per year, or about one hour per week, are to be deducted from the 11 hours of sleeping time for these interruptions. The miscellaneous interruptions were inconsequential, consuming the time of only one man, probably once a year.

The findings also show that each fireman had to stand watch one hour each night. This makes a total of not more than two hours to be deducted from the time set apart for sleeping. This would leave a total of 9 hours during which plaintiffs were permitted to sleep. In addition to this, they were allowed two hours for eating. Thus, the total time for eating and sleeping was probably about 11 hours out of the 24. There can be no doubt that these plaintiffs were allowed much more than 8 hours for eating and sleeping and, there-

fore, that they have been compensated for all hours spent in a duty status, except for eating and sleeping time.

The Premium Pay Act of September 1, 1954, *supra*, necessitated the keeping of an accurate account of the number of hours of actual work. The chief of the Fire Protection and Aircraft Crash Rescue Branch, Installations Division, and the chief of the Fire Department and his two assistants, made a calculation of the actual number of ours the firemen worked. (The two assistant chiefs are plaintiffs in this case.) This computation shows that on the average each firefighters worked 32.55 hours per week. Under the Civil Service Regulation in effect prior to September 1, 1954, they have been paid for 48 hours per week.

It would apear, therefore, that plaintiffs have been compensated for all work actually performed and for all time in a standby status, except for 8 hours set apart for eating and sleeping. Since in fact plaintiffs were allowed more than 8 hours for eating and sleeping, they have been fully compensated under the Federal Employees Pay Act of 1945, *supra*.

2. After the passage of the Premium Pay Act of September 1, 1954, *supra*, some of the plaintiffs elected to come within its provisions, but they now claim compensation on the same basis as the other plaintiffs, because of the provisions of section 401(b) of the Premium Pay Act, which reads: "Nothing contained in this section shall be construed to decrease the existing aggregate rate of compensation of any present employee * * *." However, inasmuch as we have held that under the rate of compensation in effect prior to the passage of the Premium Pay Act of 1954, plaintiffs are not entitled to recover, we do not need to consider the other provisions of the Premium Pay Act.

It results that plaintiffs are not entitled to recover and their petition will be dismissed.

It is so ordered.

Eggerton, *Circuit Judge*, sitting by designation; Laramore, *Judge*; Madden, *Judge*, and Jones, *Chief Judge*, concur.

## Findings of Fact

The court, having considered the evidence, the report of Trial Commissioner Paul H. McMurray, and the briefs and argument of counsel, makes findings of fact as follows:

1. By order of the Commissioner, the trial of this case was limited to the issues of law and fact relating to the right of the plaintiffs to recover, reserving determination of the amount of recovery, if any, for further proceedings. Accordingly, this report deals only with facts relating to the right of plaintiffs to recover.

2. For various periods of time during the 6 years prior to the filing of this petition on March 30, 1956, the plaintiffs were employed by defendant as firefighters at the Tinker Air Force Base, Oklahoma City, Oklahoma.

3. The plaintiffs seek to recover overtime compensation for the respective periods of their employment, beginning March 30, 1950, or subsequently, pursuant to the provisions of section 201 of the Federal Employees Pay Act of 1945 (59 Stat. 295), as amended, and extra night pay differential pursuant to the provisions of Section 301 of that statute.

4. Tinker Air Force Base, Oklahoma City, Oklahoma, is the largest modern industrial installation in the United States Air Force, and was planned, designed and constructed to be the model air depot of the world.

The land comprising the base amounts to more than 4,300 acres with a total of 528 buildings, having nearly 16 million square feet of floor space, of which 122 buildings are permanent-type construction, 327 are semipermanent, and 79 theater-of-operations type buildings which pro-

vide for the various servicing activities necessary to a modern world-wide airbase and for troop housing. The airfield paved area, including aprons, amounts to 1,507,08[illegible] square yards. The base has extensive aviation gasoline and jet fuel storage facilities amounting to 1,483,584 gallons.

The estimated replacement cost of the physical facilities is $121,911,344.86. No value is available for aircraft or equipment.

5. The base has the mission of maintaining, repairing and modifying aircraft, aircraft engines, and associated equipment for the United States Air Force in its global activities. In addition, it serves as a center for the repair and overhaul of all types of motor vehicles and carries on a large aircraft supply depot operation. It supplies on a high priority, requirements of vital importance to the United States Air Force.

The repair, maintenance and modification programs of the base are myriad, and encompass the most complicated projects of this character in the Air Force. A review of the historical documents shows practically every variety of aircraft work vital to the air striking force of the United States. For example, 9,670 aircraft engines were processed for repair in 1950, in addition to all other work.

The work performed included that involved in processing B-29's, B-36's, B-50's, and C-54's, calling for the installation of engines, special equipment, transmission assemblies, fuel cells, governor, distributor drive assemblies, etc.

The number of aircraft arrivals and departures for the period July to December, 1956, included 19,770 landings and 20,538 takeoffs, or over 40,000 in the 6-month period.

The base is headquarters for the Western United States in the interior defense system of the Air Force, and maintains and operates 506 fighter planes as a part of this defense. Much information bearing on the important respon-

sibility of the base as a vital part of the United States military system, is classified and cannot be publicized.

6. In 1950, the combined number of military and civilian personnel engaged at the base was approximately 28,240, represented by 23,205 civilians and 5,035 military personnel, with 2,333 military personnel residing on the base. Although these figures have fluctuated, they are fairly representative of the number at the base during the period involved in these claims.

There are today approximately 110 men in the Fire Protection and Aircraft Crash Rescue Branch. The quality of fire protection at the base has been very high, as shown by the fact that the base received first place award among all Air Force installations for the fire prevention week program conducted in the fall of 1949; second place in 1950; third place in 1952; and second place in 1954.

Plaintiffs were recruited on the basis of extensive firefighting experience and training in organized fire departments or the military services, some having a combination of both civilian and military backgrounds in organized firefighting. Some of the plaintiffs have had exclusive military experience in firefighting, with specialized training in crash and structural firefighting schools. It has been the policy of the base to secure men with military background and training in firefighting.

The practice of the base has been to cross-train firefighters in the various firefighting and crash rescue capacities and techniques, so that they are thoroughly experienced in all phases. They are also cross-trained in the use of all equipment, and rotated from station to station on the base, in both structural and crash stations, so that each firefighter is qualified and trained to perform any duty necessary, and has served at all stations.

As a part of their employment, firefighters are required to undergo continual training in firefighting methods. This

training is conducted both on the job, and by formal classwork, including specialized courses conducted away from the base.

7. The fire department at Tinker Air Force Base, Fire Protection and Aircraft Crash Rescue Branch, is a component of the Installations Division, and is headed by a fire prevention engineer. The fire department is comprised of 2 sections, the inspection and training section, and the fire department operational and training section.

The inspection and training section is headed by a chief inspector who supervises the activities of approximately 23 inspectors. The duties of this section consist of inspecting all buildings, structures, storage and parking areas; inspecting and testing all installed automatic sprinkler systems and automatic $CO_2$ systems, and all automatic manual fire alarm systems. The personnel in this section work on the basis of a 40-hour week, and are not a part of, nor directly related to the operational firefighting group which constitutes the individual plaintiffs in this action.

The fire department operational and training section is organized with a fire chief, 4 assistant chiefs, 17 crew chiefs, 17 drivers, 52 general firefighters, and approximately 20 trainees. All personnel in this section, with the exception of the fire chief, had three 24-hour tours of duty each week, from March 1951 to date of the trial. Prior to March 1951, firefighting personnel were employed on the basis of a 60-hour tour of duty per week. The 24-hour tours of duty are from 8 a. m. on one day to 8 a. m. the following day.

Further, an Area Fire Marshal system was in operation at Tinker Air Force Base, under which the base itself was divided into 11 areas, each under the supervision of a marshall who was assisted by numerous unit marshals. While this system was not in any manner connected with the fire department as such, its members now contribute to the welfare of the base in the field of inspections and fire preven-

tions. All building inspections were made by the firefighters until early in 1955. Members of the Area Fire Marshal system are military and civilian employees of the base who perform these fire-marshal duties in addition to their regular duties.

8. All plaintiffs were assigned to one of the three firefighting and aircraft crash rescue stations situated on the base but were rotated from time to time between all 3 stations.

Station No. 1 is the headquarters station, and serves primarily the military and warehouse area, including the frame buildings which house military personnel and large supply warehouses of both permanent and frame construction, with frame buildings predominating. Its duty roster includes 16 men on each shift.

Station No. 2 is located on the flight line, separated only by a thin wall from the huge flight-operations hangar, and directly under the control tower for the airfield. Primarily, this station protects the flying field, including landings and takeoffs, fueling and refueling of aircraft, and attendant operations. Its duty complement includes 25 men on each shift.

Station No. 3 is located inside the modification hangar. Its primary function is to give protection to the work in modifying and repairing air force aircraft, which work is carried on in Building 3001, and to supply structural protection to Areas B and C and the Thirty-third Air Division. It has a total of 8 men on duty for each shift.

9. The firefighting equipment utilized at the base is especially designed for Air Force use. It is complicated and represents an investment of over one-quarter million dollars. It is not of the type of equipment often associated with municipal or institutional structional firefighting. The firefighters are the only persons on the base who have operating responsibility for this equipment. Extensive

periods of training are required for proficiency in operation.

The equipment from each station operates over the entire base, and is interchangeable. In the event of an alarm, there is movement of equipment and firefighter crews from all 3 stations. This movement is either in direct response to the alarm or by way of replacement of equipment at a station from which the apparatus has responded.

In addition to alarms for actual fires or explosions and false alarms, there are also alarms calling for equipment to standby in emergency landings, ammunition landings, hospital ship landings, and for takeoffs with respect to all categories of these aircraft movements.

10. Plaintiffs were responsible for the maintenance and operation of the fire stations, and all firefighting and crash rescue equipment. It has been their duty to see that all equipment is maintained at its full operational capability at all times; to train in firefighting and aircraft crash rescue methods; to demonstrate and train others in firefighting techniques, to perform all services requiring specialized fire prevention and explosion precautions for the protection of life and property, to combat actual fires and explosions, and to rescue personnel from crashed aircraft.

In addition, there were other-related duties, such as checking the sprinkler system and its augmenting pumps, and on rare occasions, carrying out surveys of rain fall in storm sewers, for structural modification planning at the base, which made periodic demands.

Among the specific activities of plaintiffs' 24-hour day were the following:

(a) standby for emergency landings of aircraft,

(b) engine warmup standby,[1]

---

[1] Station No. 2 was responsible for this: Only had to respond when called.

(c) washdown of aviation fuel spillage.

(d) structural fires and explosions.

(e) fire calls to nearby cities in accordance with agreement with organized fire departments, Midwest City, population 24,000; Dell City, population 7,000; Oklahoma City.

(f) response to aircraft crashes.

(g) standing watch, twice each 24 hours.[2]

(h) standby for hospital aircraft landings and take-offs.

(i) response to false alarms frequently occurring owing to the extensive and sensitive alarm system at this installation.

(j) closing inspection of officers' club, NCO clubs, enlisted men's clubs, bowling alleys.

(k) nightly inspection of paper salvage building.

(l) inspection and maintenance of alarm system at night.

(m) welding standby.

(n) calls from officer of the day for gas detection surveys.

(o) Air Materiel Command tests and inspections which were made periodically, and usually at night.[3]

(p) check for water leaks in closed fire alarm system.

(q) check the water pump system for closed alarm system.

(r) spray painting standby.

(s) inspection of day rooms at night, after closing hours.

(t) refueling and defueling operational standby.

(u) standbys for contractor operations such as cooning[4] and pickling.

(v) standby on aircraft fuel system tests.[5]

(w) storm sewer water fall inspection.

(x) live ammunition landing and takeoff standbys.[6]

[2] Maximum time on this duty during nighttime is approximately 1 hour per man.

[3] Now usually performed during the daytime.

[4] Materials used were highly inflammable; terminated in 1951.

[5] This only lasted about 9 months; discontinued in 1952.

[6] This is a standby operation for all such landings and takeoffs because of the cargo involved.

(y) multiple aircraft take off and landing,
(z) maintenance of apparatus.[7]

No other personnel was responsible, trained, or authorized to carry out these functions. It was the sole responsibility of the Fire Protection and Aircraft Crash Rescue Branch. In the event of the absence or inability of the firefighters to respond in these areas, the necessary protection and service would not be available.

11. The base operated 24 hours daily for aircraft takeoff and landing, and its mission of servicing, repairing, and modifying aircraft was carried out by three 8-hour shifts of personnel engaged 24 hours a day at all times during the period of claim, so that the base was in continuous activity day and night.

The 24-hour daily operational schedule could not be arranged to suit the convenience of the fire fighter plaintiffs or to permit them to sleep at their pleasure. Thus it was necessary for all firefighters to be available for duty all hours of the night, or the function of the base would not be adequately performed. Plaintiffs were subject to call throughout the night hours for the same type of work as through the day hours.

The night hours, like the day hours, required a constant "watch" which was rotated among plaintiffs, so that on each tour one man served watch time once during the day hours and once during night hours. During this watch they were in uniform, and in the station office charged with operation of the alarm and signal system, radio, and telephone communications.

12. Night hours of duty were similar in many respects to daytime duty, and were characterized by the following: Plaintiffs responded to alarms and calls for standby in emergency landings, both routine and crash, hospital sick

[7] Military personnel attached to Station No. 1 for brief periods assisted in cleaning the station and apparatus.

landings and takeoffs, scrambled or multiple takeoffs and landings, and false alarms. There were calls for standby when either planes or equipment were being repaired, cocooned and pickled, for welding, and for spray painting when hazardous and explosive conditions prevailed. Washdowns of runways or ships flooded by aviation fuel were frequently required. There were responses to structural and grass fires. Inspection of a specialized paper-burning process and storage had to be made nightly. Various recreational facilities, such as officer's club, NCO club, day rooms, bowling alley, and theatre had to be inspected after closing hours, which were usually around midnight.

The firefighters were also called on to assume the inspection of operations on the swing and graveyard shifts. The B-29 readiness program from 1949 to 1952 required nighttime standby. There were constant nighttime aircraft engine warmups requiring standby. The Air Materiel Command regular inspection was carried out at night. Calls for inspection of smoke and gas occurrences had to be met at all hours.

13. The equipment used in combating, controlling, and preventing fires was intricate and complex. The nature of its use made it imperative that the equipment be ready for action at a moment's notice day or night. Therefore, maintenance duties were continuously performed. After each run a complete check of equipment according to Air Force Regulations and technical orders had to be made to insure performance capability and preservation of the Government's property. First and second echelon maintenance was performed on all equipment used after each run, day or night, in order that it be ready for the next call. When fire hose was used, it had to be cleaned, dried, and replaced on the trucks; tanks containing chemicals or water had to be recharged immediately; gasoline tanks had to be filled; all pressures of pressurized equipment had to be brought to operational standards. Equipment had to be cleaned and ready for inspection after each call regardless of the hour of the day or night.

14. When a call came, a large fire alarm gong sounded in all stations, and all plaintiffs were required to be fully uniformed in special Air Force firefighting equipment, at their assigned apparatus position.

The nighttime calls were for periods of varied duration, lasting from a few minutes to several hours, and there were some rare occasions when plaintiffs would be up and engaged on calls throughout the night hours. There were nights when there would be a succession of calls for long periods, or several short periods. During some nights there would be no calls, and on a few occasions there would be continuous all-night activity.

Plaintiffs were permitted to sleep at any time from 8 p.m. to 7 a.m., except when called to duty, but it was customary for many plaintiffs to retire, as a matter of choice, between 11 p.m. and midnight.

Plaintiffs were also allowed 2 hours during the 24 for eating.

The general nature and activity of the air base operations over the period of a 24-hour day, is such that there is no distinction from hour to hour, and no distinction bteween any hour insofar as plaintiffs' responsibilities for responding to all calls and demands is concerned.

The log summaries record some of the vehicle movements and other activities of the firefighters, and the hour of such activities. Log summaries for 1954, 1955, and 1956, show the following number of interruptions from 10 p.m. to 6 a.m. The summary below is derived from defendant's exhibits 9 (a) through 11 (d):

| | Emergency landings | Crash standby and fireguard | False alarm | Gasoline washdown | Miscellaneous (app.) |
|---|---|---|---|---|---|
| 1954 | 49 | 105 | 25 | 43 | 50 |
| 1955 | 27 | 87 | 17 | 42 | 40 |
| 1956 | 42 | 86 | 16 | 54 | 60 |

From 8 p. m. to 10 p. m. and from 6 a. m. to 7 a. m. there occurred about 20 percent additional interruptions of the nature set out above.

Log summaries for prior years were destroyed pursuant to regulations and are not available. These logs are typical of the activities, except that in prior years' when special projects were undertaken by Tinker Field, the activities were greater, such as during the Korean conflict.

Each plaintiff was required to stand one hour's watch duty each night.

The same logs show the number of men involved and the time consumed in each of the activities classified above. For an emergency landing, all firemen in a duty status responded. Unless a crash occurred, which was very infrequent, the average time necessary to perform this duty was generally twenty minutes. For crash standby and and fireguard, one crash truck containing from four to six firemen responded. The time generally necessary to complete this activity was fifteen minutes. False alarms were answered by two fire engines and caused a third engine to come to an active standby status. Such an alarm involved eighteen firemen. The time consumed from the departure of the vehicles until their return was generally fifteen minutes. Gasoline washdowns were performed either by a crash truck or the tank truck. The men involved varied from one to six and the time consumed by each operation was approximately thirty minutes. Miscellaneous disturbances varied greatly both as to the number of men involved and the time consumed. The vast majority of these disturbances were night inspections of the Tinker Field buildings which involved the services of one man. The logs do not disclose the amount of time such disturbances consumed.

15. During the period of their claim plaintiffs were in a duty status 24 hours, beginning at 8 a. m. and ending the

following day at 8 a. m. For the following 24 hours plaintiffs were off duty. During part of the period plaintiffs were on duty 72 hours per week, and during the remainder, they were on duty 60 hours per week.

Plaintiffs were required to be within the confines of the fire station continuously during the entire 24 hours of each tour of duty, except when on official duty elsewhere. They were not permitted to eat at the air base facilities, but were required to take their noon and evening meals in the fire station.

On September 1, 1954, Congress amended the Federal Employees Pay Act of 1945 by adding thereto a new section, 401 (68 Stat. 1111, 5 U. S. C. 926), under which employees, who were required to remain at their duty station in a standby status, were entitled to receive premium compensation for such standby duty at a certain percentage of their basic compensation, not to exceed 25 percentum, depending upon the number of hours of actual work required in their position and the number of hours they were required to remain at their duty stations in a standby status, etc.

Pursuant to this Act, a calculation was made of the amount of actual work performed by some 47 firefighters at the Tinker Air Force Base in a normal week. Such calculation was prepared by the chief of the Fire Protection and Aircraft Crash Rescue Branch, Installations Division, the chief of the Fire Department, and two assistant chiefs of the Fire Department. The two assistant chiefs are plaintiffs in the present case. This computation is in evidence as defendant's exhibit 4. It shows that on the average each firefighter worked 32.544 hours per week. On his 72 tours of duty he was assigned to spend time on various activities as follows:

| Activities | Average weekly hours |
|---|---|
| Administration | 2.30 |
| Maintenance, Equipment and grounds | 9.00 |
| Drills | 3.00 |
| Watch | 4.60 |
| Housekeeping detail: | |
| 3 men | 1.50 |
| 5 men | 1.90 |
| Standbys and emergency landings | 5.34 |
| Burning scrap lumber pit | .25 |
| Fire alarms and washdowns | 1.00 |
| Baffle washing | .052 |
| Welding standbys | .10 |
| Painting curbs, stations, etc. | .06 |
| Changing hose loads | .15 |
| Testing hose | .035 |
| Night inspection | .063 |
| Installing "No Smoking" signs | .014 |
| Fire prevention and special events | .18 |
| Classroom work and briefing | 3.00 |
| Total | 32.544 |

In general this tabulation accurately reflects the average amount of work done by a firefighter at Tinker Air Force Base in a day or a week, but does not show what amount was done in daytime, or the percentage performed at night.

16. When plaintiffs were employed, it was understood that there would be no distinction between the hours of the day and night, and no specific time was set aside for the carrying on of any personal activity, such as sleeping or eating. Plaintiffs responded to any and all calls occurring at night in the same manner as during the daytime.

The headquarters office instruction governing plaintiffs' hours of duty provided "the tour of duty of firefighters will consist of 24 hours on duty and 24 hours off duty."

17. Dormitory rooms were provided for plaintiffs in the fire stations. The dormitory at No. 2 fire station was in-

mediately adjacent to the area where planes warm up their motors and prepare for takeoffs. Airplanes warmed up at all hours of the day and night, and at times shook the windows of the dormitory where plaintiffs slept. This dormitory was approximately 30 x 50 feet, and accommodated 23 men.

The dormitory in No. 3 station is located in a building utilized for aircraft industrial operations, carried on 24 hours a day in 3 shifts. In addition, aircraft motors are warmed up just outside the building in front of the fire station. For a period of time the dormitory was separated from the break room for employees by a partition that did not go all the way to the ceiling. The time clocks for checking the employees in and out, which include the swing and graveyard shifts, were located in this room. Refreshment dispensing machines were located in this room for the benefit of employees. There is a partition now separating the dormitory and break room. However, there are frequent disturbances by men changing shifts or congregating at the machines. At this station the sleeping area and the eating area are in the same room.

Headquarters Station No. 1 enjoyed the comparative quiet of an active air base free from the immediate outside disturbances experienced at stations No. 2 and No. 3.

18. When plaintiffs were working the 60-hour tour of duty, they were paid for 40 hours at regular base-pay rates, without overtime. When they were working the 72-hour tour of duty, they received pay for 40 hours at base-pay rates, and 8 hours overtime. To state it differently, plaintiffs were paid for two-thirds of their time, on the theory that one-third of the time on duty was spent in sleeping and eating. The night-pay differential to which they were entitled, was computed on the same two-thirds basis. Plaintiffs were allowed no compensatory time off duty, nor were they allowed to sleep during the daytime hours, or given

any other special privileges to compensate them for time spent on night duties.

19. As of March 30, 1950, the beginning date of the claim here involved, Air Force Civilian Personnel Instructions, applicable to the employment of civilian firefighters at Air Force bases and installations, provided as follows:

SECTION 2

*Policies Governing Establishment Of Tours Of Duty*

1. *Establishment of Workweeks.*

A. *Basic Workweek.*—The basic workweek at Air Force activities will be 40 hours for all civilian employees exclusive of on-call employees. The tour of duty will consist of five 8-hour days and will be confined, whenever possible, to the period Monday through Friday.

. . . . . .

C. *On-Call Tours of Duty.*—(1) On-call tours of duty will be restricted to firefigther personnel both structural and aircraft crash rescue. . . .

SECTION 3

*Tours of Duty For Special Types of Employees*

1. *Fire-Fighter Personnel.*

a. *Firefighters—Normal Tour.*—The normal weekly tour of duty for on-call firefighters will be 60 hours and will be scheduled so that each member of each shift will have a normally assigned tour of duty which will result in equal distribution of night differential hours in each pay period. The tour of duty will be scheduled so that an employee is on duty two 24-hour shifts and one 12 hour shift in each administrative workweek. Deviations from this tour will be kept to a minimum. In all cases the tour must comprise a minimum of 60 hours in each administrative work week.

b. *Firefighters — Special Administrative Workweeks.*—

* * * Special administrative workweeks established for firefighters will be made effective by the written authorization of the commanding officer. * * *

c. *Other Fire-Protection Personnel.*—Fire chiefs, assistant fire chiefs, fire-prevention inspectors, and similar fire-protection personnel may be either on-call or full-time employees with a regular 8 hours a day tour, depending upon their established tour of duty and the requirements of their work assignments.

* * * * * * * *

PAY ADMINISTRATION

SECTION 1

*General Provisions*

12. *Salary Payment At Basic Rate.*—Basic pay is the straight time salary established or limited by statute * * *. Generally the basic rate of pay is applicable for normal work duty * * *. The exceptions to and modifications of this general rule are included in this chapter.

a. *Classification Act Positions.* * * *

(1) The basic per annum salary is considered as payment for employment during 52 basic workweeks, each consisting of a 40-hour basic tour of duty, except the weekly tour of duty for on-call employees is 60 hours. Basic pay for a full two-week pay period will be 1/26 of the annual rate. The basic hourly rate of pay is 1/2080 of the annual rate adjusted to the nearest cent (see paragraph 11).

(2) The basic hourly rate, except for on-call employees, will be paid for each hour in a duty status in a basic 40-hour weekly tour of duty except when holiday premium pay is applicable * * *.

(3) On-call firefighters and similar types of employees performing on-call duty will be paid for each hour in a duty status in a basic 60-hour weekly tour of duty at two-thirds of the amount computed at the full basic rate, except when holiday premium pay is appli-

cable. On-call duty outside the regularly scheduled daily or weekly tour of duty hours will be payable at two-thirds of the amount computed at the full basic hourly rate unless the total hours in a pay status exceed 60 hours within an administrative week. When other than on-call duty is performed under the conditions above the full basic hourly rate of pay will be applicable.

(4) Overtime, holiday premium, or night differential pay * * * are not a part of the basic rate of pay. These payments are in addition to basic salary.

* * * * * * * *

SECTION 2

*Overtime Pay*

8. *Overtime Work Period.*—Generally, all authorized or approved duty in excess of 40 hours in a pay status in an established administrative week constitutes time for which an overtime rate is payable. Modifications or exceptions are as follows:

* * * * * * * *

c. *On-call employees.*—On-call employees will receive overtime pay, or be granted compensatory time off, for all officially ordered and approved work performed in excess of 60 hours in a pay status in an established administrative week.

* * * * * * * *

10. *Rates of Overtime Pay.*—Generally, the rate of overtime pay is one and one-half times the straight time hourly rate of pay except as modified below:

C. *On-call Employees.*—The overtime rate for on-call employees is computed on the same basis as for other Classification Act positions except:

(1) The overtime hourly rate of pay for on-call duty in excess of 60 hours in an administrative week will be two-thirds of the amount computed at the full hourly overtime rate.

(2) The overtime hourly rate of pay will be the full hourly overtime rate of pay for duty in excess of 60

hours in an administrative week when other than on-call duty is performed, for example, when a firefighter is called to duty to assist in actually fighting a fire outside a regularly scheduled tour of duty.

. . . . . .

SECTION 3

*Holiday Pay*

10. *Premium Pay for Holiday Work.*

. . . . . .

g. *On-call Employees.*—On-call employees will be paid holiday premium pay at two-thirds of the amount computed at twice the straight-time rate for auhorized work performed on a holiday or the observed day *not in excess of 12 hours*, which fall within the employees' regularly scheduled 60-hour basic workweek.

11. *Pay When No Holiday Work Performed.*

. . . . . .

b. *On-call Employees.*—On-call employees who are prevented from working because of the occurrence of a legal holiday, will receive pay for the day for the hours of the tour of duty that fall on the holiday at two-thirds of the amount computed at straight time rates, provided the holiday or the observed day falls within the on-call employee's regularly scheduled basic 60-hour tour of duty. If the holiday or observed day is outside the basic 60-hour tour of duty, no compensation will be payable for the day unless work is performed.

. . . . . .

SECTION 4

*Night Pay*

7. *Night Differ[illegible]al Pay for Classification Act Positions.*

*a. Night Differential Rate.*—The night differential pay for Classification Act positions is always a flat 10 percent of the hourly basic rate of pay, except as provided in f below. The fact that the same hours may be included in the computation of holiday premium or

overtime pay has no effect upon the night differential pay computation.

. . . . . .

*d. When Payable.*—The night differential is payable for those hours of an established tour of duty, including regularly scheduled overtime, falling between the clock hours of 1800 and 0600 the following day . . .

. . . . . .

*f. Rate for On-Call Employees.*—The night differential pay for on-call employees is two-thirds of the amount computed at 10 percent of the full hourly basic rate of pay, for the time for which night differential payment is proper.

There were various changes in the language of these regulations between August 17, 1949 and November 1954, but these changes did not alter the substance of the regulations.

20. Conditions of employment of firefighters at the Tinker Air Force Base were substantially unchanged from the effective date of the Federal Employees Pay Act of 1945, on July 1, 1945, to the date of filing of the petition in this case. At no time prior to the filing of the petition in this case did the civilian firefighters at Tinker Air Force Base formally make known their dissatisfaction with conditions of their employment, including pay adjustments, by means of a grievance procedure, which was available to handle such matters subsequent to the passage of the Federal Employees Pay Act of 1945.

In 1948 approximately 35 firefighters at the Tinker Air Force Base, including a number of plaintiffs in this case, addressed letters to the Army Finance Center, and to the General Accounting Office, claiming improper payment under Public Law 573, 79th Cong., 2d Sess., which contained language somewhat similar to the 1945 Federal Employees Pay Act.

This effort to obtain additional compensation was common knowledge among the firefighters at the base, who were

also acquainted with similar action on the part of other firefighters at an airbase in Texas. Replies were received, denying their right to additional compensation, although the General Accounting Office did assign claim numbers to each of the letters addressed to it by individual firefighters. This was also common knowledge among the firefighters at the base, and further letters were not sent, as it was considered a useless gesture. Many firefighters had not participated in the submission of claims originally, because they understood that if one claim were allowed all would be given the same consideration.

The dissatisfaction and controversy as to the proper method of payment of the firefighters was known to the civilian personnel office on an informal basis. However, no official action was taken by that office, as it was felt that the firefighters were being properly paid for services rendered, in accordance with the regulations of the War Department, or the Department of the Air Force, for the applicable periods of these claims under the two departments.

21. The record discloses that the turnover in the fire department personnel was very small, and that no firefighter, who did leave, attributed his departure to any dissatisfaction with conditions of employment as they existed at the time.

## Conclusion of Law

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiffs are not entitled to recover, and their petition is therefore dismissed.

LE COPY

Office-Supreme Court, U.S.
FILED
MAR 3 1958
CLERK

In the Supreme Court of the United States

October Term, 1957

No. 1000

MARIAN M. [illegible]

vs.

[illegible]

ON PETITION FOR A WRIT OF CERTIORARI TO THE [illegible]

BRIEF FOR THE [illegible]

[illegible]

# INDEX


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Question presented | 1 |
| Statutes and regulations involved | 2 |
| Statement | 4 |
| Argument | 6 |
| Conclusion | 12 |


## CITATIONS


Cases:

*Ahearn* v. *United States*, C. Cls. No. 332–55, decided May 7, 1958 — 12

*Armour & Co.* v. *Wantock*, 323 U.S. 126 — 6, 7, 11

*Avary* v. *United States*, C. Cls. No. 266–56, decided March 5, 1958 — 12

*Bell* v. *Porter*, 159 F. 2d 117, certiorari denied, 330 U.S. 813, 817 — 6

*Central Missouri Tel. Co.* v. *Conwell*, 170 F. 2d 641 — 10

*Collins* v. *United States*, C. Cls. No. 141–56, decided March 5, 1958 — 12

*Conn.* v. *United States*, 107 C. Cls. 422, certiorari denied, 332 U.S. 757 — 7

*Culkin, et al.* v. *Glenn L. Martin Nebraska Co.*, 97 F. Supp. 661 — 11

*England* v. *United States*, 133 C. Cls. 768 — 11

*Farley* v. *United States*, 131 C. Cls. 776 — 11

*F. W. Stock & Sons, Inc.* v. *Thompson*, 194 F. 2d 493 — 10

*Gaetke* v. *United States*, 136 C. Cls. 756, 145 F. Supp. 913 — 11–12

*General Electric Co.* v. *Porter*, 208 F. 2d 805, certiorari denied, 347 U.S. 951 — 6, 11

*Glenn L. Martin Nebraska Co.* v. *Culkin*, 197 F. 2d 981, certiorari denied, 344 U.S. 866 — 6, 11

*Rokey* v. *Day & Zimmermann*, 157 F. 2d 734, certiorari denied, 330 U.S. 842 — 6




515948—59——1

Cases—Continued Page

*Sawyer* v. *United States*, 138 C. Cls. 152, certiorari denied, 355 U.S. 868 ..... 6-7, 12

*Skidmore* v. *Swift & Co.*, 323 U.S. 134 ..... 6, 7, 8, 9, 11

*Wright* v. *United States*, C. Cls. No. 232-57, decided January 14, 1959, certiorari denied, 359 U.S. 1001 .. 6, 12

Statutes and regulations:

Fair Labor Standards Act, 52 Stat. 1060, as amended, 29 U.S.C. 201 ..... 6

Federal Employees Pay Act of 1945, 59 Stat. 295, as amended, 5 U.S.C. (1952 ed.) 901, *et seq.*:

Section 201 ..... 2

Section 301 ..... 2

Federal Employees Pay Act Amendments of 1954, 68 Stat. 1109, 5 U.S.C. 911 *et seq.*

Section 203 ..... 2

Section 206 ..... 2

Miscellaneous:

Pay Administration of Air Force Civilian Personnel Manual 40-1:

Section 1, par. 12(a) ..... 2

Section 2, par. 10 ..... 3

Section 4, par. 7 ..... 4

S. Rep. No. 687, 85th Cong., 1st Sess., p. 2 ..... 9

# In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 190

MERLIN M. ARMSTRONG, ET AL., PETITIONERS

*v.*

THE UNITED STATES

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a) is not yet reported.

### JURISDICTION

The final judgment of the Court of Claims was entered on January 14, 1959. A timely petition for rehearing was denied on April 8, 1959. The petition for a writ of certiorari was filed on July 7, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

### QUESTION PRESENTED

Whether, in the circumstances of this case, civilian firefighters employed by the Department of the Air

Force are entitled, under the Federal Employees Pay Act of 1945, to compensation for periods of on-call time allowed for eating and sleeping.

STATUTES AND REGULATIONS INVOLVED

The Federal Employees Pay Act of 1945, 59 Stat. 295, as amended, 5 U.S.C. 901, provides in pertinent part:

> SEC. 201. Officers and employees to whom this title applies shall, in addition to their basic compensation, be compensated for all hours of employment, officially ordered or approved, in excess of forty hours in any administrative workweek, at overtime rates * * *. [59 Stat. 296, 5 U.S.C. (1952 ed.) 911.]
>
> SEC. 301. Any officer or employee to whom this title applies who is assigned to a regularly scheduled tour of duty, any part of which, including overtime, falls between the hours of 6 o'clock postmeridian and 6 o'clock antemeridian, shall, for duty between such hours, excluding periods when he is in a leave status, be paid compensation at a rate of 10 per centum in excess of his rate of basic compensation for duty between other hours * * *. [59 Stat. 298, as amended, 5 U.S.C. (1952 ed.) 921.[1]]

The chapter on Pay Administration of Air Force Civilian Personnel Manual 40–1, provides, in pertinent part:

Section 1, par. 12a:

> (3) On-call firefighters and similar types of employees performing on-call duty will be paid for each hour in a duty status in a basic 60-hour weekly tour of duty at two-thirds of the

[1] An amendment in 1954 did not affect the substance of either section. 68 Stat. 1109, 1110, 5 U.S.C. 911, 921.

amount computed at the full basic rate, except when holiday premium pay is applicable. On-call duty outside the regularly scheduled daily or weekly tour of duty hours will be payable at two-thirds of the amount computed at the full basic hourly rate unless the total hours in a pay status exceed 60 hours within an administrative week. When other than on-call duty is performed under the conditions above the full basic hourly rate of pay will be applicable.

(4) Overtime, holiday premium, or night differential pay * * * are not a part of the basic rate of pay. These payments are in addition to basic salary.

* * * * * *

Section 2, par. 10:

10. *Rates of Overtime Pay.*—Generally, the rate of overtime pay is one and one-half times the straight time hourly rate of pay except as modified below:

C. *On-Call Employees.*—The overtime rate for on-call employees is computed on the same basis as for other Classification Act positions, except:

(1) The overtime hourly rate of pay for on-call duty in excess of 60 hours in an administrative week will be two-thirds of the amount computed at the full hourly overtime rate.

(2) The overtime hourly rate of pay will be the full hourly overtime rate of pay for duty in excess of 60 hours in an administrative week when other than on-call duty is performed, for example, when a firefighter is called to duty to assist in actually fighting a fire outside a regularly scheduled tour of duty.

* * * * * *

Section 4, par. 7:

> f. *Rate for On-Call Employees.*—The night differential pay for on-call employees is two-thirds of the amount computed at 10 percent of the full hourly basic rate of pay, for the time for which night differential payment is proper.[2]

**STATEMENT**

Petitioners, civilian firefighters employed by the Department of the Air Force, filed suit for overtime and night-differential compensation allegedly due them under the Federal Employees Pay Act of 1945, *supra*. Their claim is that they are entitled to such compensation for periods of on-call time allowed for eating and sleeping. The pertinent facts as found by the Court of Claims may be briefly summarized as follows:

Petitioners were employed as firefighters by the Department of the Air Force at Tinker Air Force Base, Oklahoma (F. 2, Pet. App. 9a).[3] Prior to March 1951, they worked two 24-hour and one 12-hour tour of duty per week. Beginning in March 1951, they worked three 24-hour tours per week (F. 7, Pet. App. 12a). Each tour was separated by at least twenty-four hours off duty (F. 15, Pet. App. 19a-20a).

All of the petitioners were compensated for firefighting duties pursuant to the so-called "two-thirds rule" (F. 18, 19, Pet. App. 22a–27a, see p. 3, *supra*). Under this method of compensation, one-third of a tour of duty, although it is time when a firefighter is

[2] Reprinted in Finding 19, Pet. App. 23a. Various language changes have been made in this regulation, but these changes have not altered its substance.

[3] "F" references are to the findings of the Court of Claims.

subject to call and must remain on government premises, is set aside for eating and sleeping and is non-compensable. The remaining two-thirds of the tour is divided equally between active work time and an inactive standby period. Both of these periods are considered to be compensable hours of employment, and they are subject to the application of overtime and night-differential rates.

In the present case, petitioners received pay for forty-eight hours (40 hours at the regular rate and 8 hours at the overtime rate) when on the 72-hour week, and received pay for forty hours when on the 60-hour week. Night-differential pay was credited for two-thirds of the nighttime duty hours (F. 18, Pet. App. 22a–23a). They were permitted to sleep from 8 o'clock p.m. until 7 o'clock a.m. during each tour of duty and were allowed two hours during each twenty-four for eating (F. 14, Pet. App. 18a).

Petitioners were called upon to perform certain duties during their eleven-hour sleeping period (F. 14, Pet. App. 18a), but, as the court found, these duties took up an average total of less than two hours per night (Pet. App. 7a). There remained more than nine hours each night during which petitioners were able to sleep. Thus petitioners had available for sleeping and eating eleven hours out of every twenty-four, only eight of which were uncompensated.

The Court of Claims denied recovery on the ground that firefighters are not "entitled to compensation for time spent in sleeping and eating," so long as they are allowed at least eight hours out of each twenty-four

for such purposes, "merely because such time was subject to possible interruptions." (Pet. App. 4a, 6a).

## ARGUMENT

1. In two companion cases, this Court considered whether time spent on an employer's premises by firefighters who are subject to call, but who are not engaged in the performance of actual work, constitutes working time for the purposes of the Fair Labor Standards Act, 52 Stat. 1060, as amended, 29 U.S.C. 201. *Skidmore* v. *Swift & Co.*, 323 U.S. 134; *Armour & Co.* v. *Wantock*, 323 U.S. 126. The Court held that the question cannot be resolved on the basis of any legal formula, but is a question of fact to be resolved by appropriate findings of the trial court in the light of the circumstances of each case. Since the *Armour* and *Skidmore* decisions, the Court has consistently refused to review decisions dealing with the compensability of such time under varying factual situation. E.g., *General Electric Co.* v. *Porter*, 208 F. 2d 805 (C.A. 9), certiorari denied, 347 U.S. 951; *Glenn L. Martin Nebraska Co.* v. *Culkin*, 197 F. 2d 981 (C.A. 8), certiorari denied, 344 U.S. 866; *Bell* v. *Porter*, 159 F. 2d 117 (C.A. 7), certiorari denied, 330 U.S. 813, 817; *Rokey* v. *Day & Zimmermann*, 157 F. 2d 734 (C.A. 8), certiorari denied, 330 U.S. 842; *Wright* v. *United States*, C. Cls. No. 232-57, decided January 14, 1959, certiorari denied, 359 U.S. 1001;[*] *Sawyer* v. *United States*, 138 C. Cls. 152,

[*] The arguments presented to this Court by the Government in *Wright* are fully applicable to this case. For the convenience of the Court, however, we repeat them here.

certiorari denied, 355 U.S. 868; *Conn* v. *United States*, 107 C. Cls. 422, certiorari denied, 332 U.S. 757. In the three cases last cited, this Court declined to review decisions of the Court of Claims with respect to the rights, under applicable pay statutes, of civilian firefighters employed by the Government. The present case is simply another in this series. It does not present any new question of general import and it does not give rise to conflict.

In *Armour & Co.* v. *Wantock, supra*, the district court had held that firefighters employed by a private company were not entitled to compensation for stand-by time normally set aside for eating and sleeping, but were entitled to be paid for the remaining hours on call during which no actual work was performed. Both the court of appeals and this Court affirmed that portion of the judgment which was adverse to the employer; the employees, who had originally contended that all stand-by time was compensable, had taken no appeal. Thus, the precise issue in the present case—whether eating and sleeping time is compensable—was not specifically resolved. The Court pointed out, however (323 U.S. at 133):

> Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer. Whether time is spent predominantly for the employer's benefit or for the employee's is a question dependent upon all the circumstances of the case.

In *Skidmore* v. *Swift & Co., supra*, decided on the same day, this Court reversed a lower court decision

refusing any recovery whatever for on-call time during which no actual work was performed. The Court held that no principle of law precluded a determination that waiting time was working time and that "[w]hether in a concrete case such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court. * * * Each case must stand on its own facts." 323 U.S. at 136–37, 140. Again, the question of compensation for relatively long, uninterrupted periods of waiting time set aside for eating and sleeping was not directly in issue. But the Court discussed with approval the manner in which the Administrator of the Wage and Hour Division had resolved the problem administratively. 323 U.S. at 138–39. The Administrator had concluded that a flexible solution was necessary and that in some situations periods of inactivity are not properly counted as working time, *even though the employee is subject to call,* such as portions of a 24-hour tour of duty when the employee "has a normal night's sleep, has ample time in which to eat his meals, and has a certain amount of time for relaxation and entirely private pursuits." 323 U.S. at 138. With respect to firefighters, the Court noted, as "entitled to respect" (p. 140), the conclusion of the Administrator, expressed in his brief *amicus curiae* in that case, that the appropriate standard called for "the exclusion of sleeping and eating time of these employees from the workweek and the inclusion of all other on-call time: although the employees were required to remain on the premises during the entire time, the evidence shows that they were very rarely

interrupted in their normal sleeping and eating time, and these are pursuits of a purely private nature which would presumably occupy the employees' time whether they were on duty or not and which apparently could be pursued adequately and comfortably in the required circumstances * * *" (p. 139).[5]

The Court of Claims correctly applied these principles in holding that petitioners were fully compensated by being paid both for the time actually worked and for the inactive period of standby duty, and that they are not entitled to additional compensation for time spent in eating and sleeping, even though they were subject to call during those periods. Petitioners were permitted to sleep from 8 o'clock p.m. until 7 o'clock a.m. during each 24-hour shift and were allowed two hours of each 24 for meals. Interruptions during these periods averaged no more than two hours in each tour of duty. Since at least

[5] This is also the understanding which the Senate Committee on Post Office and Civil Service has of the Federal Employees Pay Act. In recommending a proposed amendment to that Act, the Committee said:

"The equity of the bill lies in the fact that under its terms each fire fighter or other 'long-tour standby' employee would be paid for unscheduled and irregular overtime beyond his established tour on exactly the same basis as other Federal employees. In that respect the committee desires to make clear that overtime would not be paid for time allowed for eating and sleeping during overtime assignments. This is consistent with the provisions of the Federal Employees Pay Act under which standby employees paid under the regular hourly premium pay provisions are not paid for uninterrupted periods allowed for sleeping and eating and the Fair Labor Standards Act which does not require that standby employees in industry be paid for such periods."

S. Rep. No. 687, 85th Cong., 1st Sess., p. 2.

eleven hours remained for eating and sleeping, petitioners were fully compensated for the interruptions and now claim compensation only for time spent eating and sleeping during regular, lengthy periods allowed for such purposes. A recovery of this kind would be novel and contrary to the consistent practice under both the Fair Labor Standards Act and the applicable federal pay statutes.

2. Petitioners contend (Pet. 15–17) that the decision below is in conflict with certain appellate decisions under the Fair Labor Standards Act. However, the alleged conflicts merely reflect the differing factual situations involved in those cases.

In *Central Missouri Tel. Co.* v. *Conwell*, 170 F. 2d 641 (C.A. 8), the court held that an employer could not deduct three hours as sleeping time from an 11-hour shift of night telephone operators. The decision was based on the fact that the operators could rest only as duties permitted, constantly had to attend to the switchboard and other work matters during the entire tour, and on many nights were disturbed at frequent intervals. Thus, the operators were not only in readiness but rendered considerable service for which they had received no compensation.

Similarly, in *F. W. Stock & Sons, Inc.* v. *Thompson*, 194 F. 2d 493, the Sixth Circuit held that mechanics' and engineers' "lunch periods" were compensable since the time was spent predominantly for the employer's benefit watching and caring for machinery—"A man who has to oil machinery with a sandwich in his hand is not having a free lunch period." 194 F. 2d at 496.

In *General Electric Co.* v. *Porter*, 208 F. 2d 805, certiorari denied, 347 U.S. 951, the Ninth Circuit, noting that whether or not sleeping time of firefighters is compensable depends upon the circumstances, took into account that the firefighters had to protect not only the employer's plant area but two populous communities as well, thus greatly increasing the probability of an alarm at night.

In *Glenn L. Martin Nebraska Co.* v. *Culkin*, 197 F. 2d 981, the Eighth Circuit affirmed a district court's finding that an employer was required to compensate his employees for their lunch period when, because of duties that they were assigned during this period, their time was not their own but belonged to the company. 97 F. Supp. 661, 669–70 (D. Neb.).

None of these holdings is inconsistent with the case at bar. Each turns on its own facts.

3. Petitioners also contend (Pet. 18–22) that the decision of the Court of Claims in this case is inconsistent with other decisions of that court. But the Court of Claims has consistently followed the rule that, under the Federal Employees Pay Act of 1945, *supra*, an employee is not to be compensated for time reserved for sleeping and eating merely because such time was subject to possible interruptions, but is to be compensated for any substantial periods within that reserved time in which he actually performs labor for the Government. In short, the Court of Claims has adhered to the principles elucidated by this Court in *Armour* and *Skidmore*, *supra*. See *Farley* v. *United States*, 131 C. Cls. 776; *England* v. *United States*, 133 C. Cls. 768; *Gaetke* v. *United States*, 136

C. Cls. 756, 145 F. Supp. 913; *Sawyer* v. *United States*, 138 C. Cls. 152, certiorari denied, 355 U.S. 868; *Collins* v. *United States*, C. Cls. No. 141–56, decided March 5, 1958; *Avary* v. *United States*, C. Cls. No. 266–56, decided March 5, 1958; *Ahearn* v. *United States*, C. Cls. No. 332–55, decided May 7, 1958; *Wright* v. *United States*, C. Cls. No. 232–57, decided January 14, 1959, certiorari denied, 359 U.S. 1001. The present case is but another instance in which the court below has undertaken to apply the settled rule of law.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
*Solicitor General.*
GEORGE COCHRAN DOUB,
*Assistant Attorney General.*
SAMUEL D. SLADE,
SHERMAN L. COHN,
*Attorneys.*

AUGUST 1959.

U.S. GOVERNMENT PRINTING OFFICE: 1959

FILE COPY

FILED
AUG 24 1959
JAMES R. BROWNING, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959

No. 190

MERLIN M. ARMSTRONG, ET AL., *Petitioners*

v.

THE UNITED STATES, *Respondent*

## PETITIONERS' REPLY BRIEF

DONALD S. DAWSON
*Attorney for Petitioners*
731 Washington Building
Washington 5, D. C.

*Of Counsel*

SAVAGE, GIBSON, BENEFIELD & SHELTON
Liberty Bank Building
Oklahoma City, Oklahoma

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

## INDEX


| | Page |
|---|---|
| I. Respondent Creates A False Issue | 1 |
| II. Respondent's Statement of Facts Is In Error | 3 |
| III. Reply To Respondent's Argument | 5 |
| A. Respondent Refuses to Recognize the Lack of Conflict Among Prior Cases Where Certiorari Was Denied | 5 |
| B. Respondent Misconstrues the Opinions of the Various Circuit Courts of Appeals in an Attempt to Find a Lack of Conflict with the Present Case | 10 |
| C. By Ignoring the Conflict of the Present Case With Prior Decisions in the Court of Claims Respondent Tacitly Recognizes It | 14 |
| IV. Respondent Ignores The Questions As To Night Differential and Pay for Actual Labor | 18 |
| V. Conclusion | 18 |


### Table of Cases


Ahearn v. United States, No. 332-55, C.Cls. May 7, 1958 ..... 16

Armour & Co. v. Wantock, 323 U.S. 126, (1944) ..6, 7, 12, 15, 16, 17, 18

Avary v. United States, No. 266-56, C.Cls. March 5, 1958 ..... 17

Bell v. Porter, 159 F.2d 117 (7th Cir. 1947); cert. den. 330 U.S. 813 (1947) ..... 6

Central Missouri Telephone Co. v. Conwell, 170 F.2d 641 (8th Cir. 1948) .....11, 12

Chicago, R.I. & Pacific Rwy. Co. v. United States, 253 F. 555 (8th Cir. 1918) ..... 10

Collins v. United States, No. 141-56, C.Cls. March 5, 1958 ..... 17

Conn v. United States, 107 C.Cls. 422, 68 F.Supp. 966 (1944) ..... 7

England v. United States, 133 C.Cls. 768 (1956) ..10, 14, 15, 17

Page

Farley v. United States, 133 C.Cls. 776 (1955) ..... 10, 14, 15, 16, 17
Gaetke v. United States, 136 C.Cls. 756, 145 F.Supp. 913 (1956) ..... 6, 16, 17
General Electric Co. v. Porter, 208 F.2d 805 (9th Cir. 1954) ..... 5, 10, 12
Glen L. Martin Nebraska Co. v. Culkin, 197 F.2d 981 (8th Cir. 1952) ..... 5, 6, 10, 13, 14
M. K. & T. Railway Co. v. United States, 231 U.S. 112, (1913) ..... 10
Rokey v. Day & Zimmerman, 157 F.2d 734 (8th Cir. 1946) ..... 6, 8
Sawyer v. United States, 138 C.Cls. 152 (19 ), cert. den. 355 U.S. 868 ..... 6, 16
F. W. Stock & Sons v. Thompson, 194 F.2d 493 (6th Cir. 1952) ..... 1[illegible]
Skidmore v. Swift & Co., 323 U.S. 134, 137 (1944) ..... 15, 16
Wright v. United States, No. 232-57, C.Cls. January 14, 1959 ..... 17

STATUTES

Federal Employees Pay Act of 1945, 59 Stat. 295 as amended 5 U.S.C. 911, 921 ..... 9, 14
Federal Employees Pay Act of 1954, 68 Stat. 1111 ..... 9

MISCELLANEOUS

Federal Personnel Manuel Z-1, Sec. 25.211(c) ..... 4
Wage and Hour Interpretative Bulletin, Sec. 785.3d ..... 7, 8

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959

---

No. 190

---

MERLIN M. ARMSTRONG, ET AL., *Petitioners*

v.

THE UNITED STATES, *Respondent*

---

## PETITIONERS' REPLY BRIEF

---

### I

### RESPONDENT CREATES A FALSE ISSUE

The respondent has sugar-coated its version of the question. The choice of words used is such as to indicate petitioners were given normal time for sleeping and eating without restriction or condition.

Such a conclusion is demonstrably false on the basis of the findings of the court below:

> ". . . The base was in continuous activity day and night.
>
> "The 24-hour daily operational schedule could not be arranged to suit the convenience of the fire-

fighter plaintiffs or to permit them to sleep at their pleasure. Thus it was necessary for all firefighters to be available for duty all hours of the night, or the function of the base would not be adequately performed. Plaintiffs were subject to call throughout the night hours for the same type of work as through the day hours . . . (F. 11)[1]

"Night hours of duty were similar in many respects to daytime duty and were characterized by the following . . . (F. 11)

(Activities listed; see also F. 10)

". . . there were nights when there would be a succession of calls for long periods or several short periods . . .

"The general nature and activity of the air base operations over the period of a 24-hour day is such that there is no distinction from hour to hour and no distinction between any hour insofar as plaintiffs' responsibilities for responding to all calls and demands is concerned. (F. 14)

"When plaintiffs were employed, it was understood that there would be no distinction between the hours of the day and night, and no specific time was set aside for the carrying on of any personal activity, such as sleeping or eating. Plaintiffs responded to any and all calls occurring at night in the same manner as during the daytime . . ." (F. 16)

There was no Department of the Air Force Regulation or Base Regulation prescribing hours to be set aside for sleep.

The real question is, "Can the Federal Government keep employees on the job overnight—8 hours—without pay or any consideration whatever when their

[1] "F" references are to the findings of the Court of Claims.

presence and service is required for the benefit of the Government?"

The respondent, in its reply, has ignored the question as to whether petitioners are entitled to recovery for hours of actual work performed and the interruptions during the eating and night hours for which they were not paid.

The respondent has furthermore completely ignored the question as to whether petitioners are entitled to full night differential pay for all hours of duty between 6 p.m. and 6 a.m.

## II

## RESPONDENT'S STATEMENT OF FACTS IS IN ERROR

The respondent, in summarizing some of the facts found by the Court of Claims, states that petitioners were compensated for *firefighting duties* pursuant to the so-called two-third's rule. This is inaccurate for they were not compensated for *any* actual duties performed during 8 hours of each tour of duty.

This is precisely the issue raised in petitioners' question number two, which respondent has overlooked:

> ". . . are plaintiffs nevertheless entitled to recover for hours of actual work performed and the interruptions during their so-called eating hours and night hours?"

Respondent errs again in stating that one-third of a tour is set aside for eating and sleeping and that the remaining two-thirds are divided equally between active worktime and inactive standby period. Finding 16 of the Court of Claims specifically negates this:

> "When plaintiffs were employed, it was understood that there would be no distinction between

the hours of the day and night, and no specific time was set aside for the carrying on of any personal activities, such as sleeping or eating . . ."

Neither was there any Department of the Air Force Regulation or Base Regulation prescribing hours to be set aside for sleep as required by the United States Civil Service Commission if the so-called two-third's rule were to be followed (Federal Personnel Manual Z-1, Section 25.211 (c)).

The headquarters office instruction governing petitioners' hours of duty provided "the tour of duty of firefighters will consist of 24 hours on duty, and 24 hours off duty". (F. 16)

It is true, as respondent has stated, although quite paradoxical, that the Government felt the time of petitioners spent in dominoe playing was fully compensable, while denying compensation for hours they were forced to remain in the fire station away from their families at night.

Respondent indicates that the petitioners only had to remain at the base, whereas the true fact is, they were restricted to the narrow confines of the fire stations without permission to have visitors or to take their meals in the base cafeteria.

Respondent states petitioners were permitted to sleep certain hours and allowed time for eating. This oversimplifies the facts as they were only allowed at certain times to sleep or eat if there were no work calls to be performed.

Findings 10 and 12 of the Court of Claims list many duties that had to be carried on during the night hours and eating hours, and Finding 11 makes note of the

night watch which was required of each petitioner. This finding also refers to the fact that, "the 24-hour daily operational schedule could not be arranged to suit the convenience of the firefighter plaintiffs or to permit them to sleep at their pleasure."

The Court below finds further:

> "Thus it was necessary for all firefighters to be available for duty all hours of the night, or the function of base would not be adequately performed," (F. 11).

## III

## REPLY TO RESPONDENT'S ARGUMENT

### A. Respondent Refuses to Recognize the Lack of Conflict Among Prior Cases Where Certiorari Was Denied

In considering petitions for certiorari, it is the aim of this Court to arbitrate the conflicts among the lower courts and to determine questions of importance. Respondent cites a number of cases wherein petitions for writs of certiorari have been denied. But these cases do not raise the issue of conflicting decisions.

*General Electric Company* v. *Porter*, 208 F. 2d, 805 (9th Cir. 1954) and *Glen L. Martin Nebraska Co.* v. *Calkin*, 197 F. 2d 981 (8th Cir. 1952), cited by respondent hold that the plaintiffs are entitled to full compensation for the period claimed.

> "Considering the nature of the service performed by the firemen, we conclude that the firemen were engaged to wait; that their compensation covered both waiting and task, and that the living quarters were furnished as a facility of the task." *General Electric Company*, v. *Porter*, *supra*, at page 815.

> "But the question was not so much whether the guards and firemen were actually regularly called upon to put down overt acts of violence, sabotage, disturbances, or to put out fires during the 30-minute period, *as it was whether they were performing their regular duties during that period and were then substantially performing the duties assigned to them by their employer and were not free to follow pursuits of a purely private nature.*" (Emphasis supplied) *Glen L. Martin Nebraska Co.* v. *Culkin, supra,* at page 984.

Thus, the courts followed the decision of this Court in *Armour & Co.* v. *Wantock*, 323 U.S. 126 (1944).

Respondent, in citing *Bell* v. *Porter*, 159 F. 2d 117 (7th Cir. 1947) and *Rokey* v. *Day & Zimmerman*, 157 F. 2d 734 (8th Cir. 1946) failed to note that in these cases the courts specifically found that there were express agreements or contracts between the employees and the employers exempting the time in question from being working time. The courts based their decisions on these agreements.

Respondent further cites *Sawyer* v. *United States*, 138 C.Cls. 152[1] which denied any recovery for night hours of duty, "on the authority of our opinion in the *Gaetke* case . . ." In *Gaetke* v. *United States*, 136 C.Cls. 756, 145 F. Supp. 913 (1956), the Court found again that there was a specific written agreement with respect to the hours in contention and said, "The contract between the employees and the railroad was a sensible and realistic application of the statute to the peculiar requirements of plaintiffs' jobs."

Thus, we have a division in the decisions which can readily be reconciled on the basis of the existence or

[1] See Petition page 19 footnote 1.

absence of a controlling agreement. There was no conflict, and the petitions were therefore denied.

Respondents have cited *Conn* v. *United States*, 107 C.Cls. 422, 68 F. Supp. 966 (1944), but in that case there is no conflict, because it was decided under an entirely different statute which specifically provided premium pay for overnight work and the court found plaintiffs were properly paid for their night work under that premium pay proviso. Such a provision is not included in the statute applicable to the case at bar.

Respondent cites this Court's decision in *Armour & Co.* v. *Wantock*, 323 U.S. 126 (1944), quoting, "Whether time is spent predominantly for the employer's benefit or for the employee's is a question dependent upon all the circumstances of the case." But that question was not answered nor even applied by the court below in the case at bar. Its decision was based upon a preconceived notion that nighttime and eating time are not compensable and that only actual physical labor should be paid.

Respondent again refers to the decision in *Armour* wherein this Court discussed with approval the manner in which the Administrator of the Wage and Hour Division had resolved the problem administratively *at that time*. But Respondent completely ignores the fact that *the Administrator has now reversed his position* as set forth in the current and applicable Interpretative Bulletin which provides in Footnote 22 to Section 785.3 d:

> "Where no expressed or implied agreement to the contrary is present the 8 hours of sleeping time and lunch periods constitute hours worked."

With respect to eating time, the current bulletin provides:

> "The employee must be completely relieved from duty for the purpose of eating regular meals or the mealtime will be considered working time.
>
> "The employee is not relieved if he is required to perform any duties whether active or inactive while eating, for example, the office employee who is required to eat at his desk . . ." (785.3 d)

It will also be noted from an examination of the opinion in *Rokey* v. *Day & Zimmerman*, 157 F. 2d 734 (8th Cir. 1946), cited by respondent, that there was introduced in evidence as an exhibit a letter from the Deputy Wage and Hour Division Administrator, approving the hours of work proposed providing,

> ". . . that employees will be paid for any time during those 8 hours that they may be required for fire calls or fire-fighting purposes, and *provided that the arrangement is mutually satisfactory to the employer and the employees.*" (Emphasis supplied)

In that case the plaintiffs approved the plan.

The Wage and Hour Division clearly feels it essential to have an agreement authorizing deduction of night and eating hours from working time specifically approved if the time is to be deducted and, further, that work performed during such time shall be compensated.

We feel this Court will be moved to accord similar respect to the applicable version of the Wage and Hour Division policy which reverses the old policy quoted by respondent.

We cannot understand how one department of the Executive Branch—the Department of the Air Force, represented by the Department of Justice—can consistently ignore the rulings and policies of another branch—the Department of Labor—in a field in which it is the so-called authority. But the fact remains, this is just what has happened.

Furthermore, respondent is inaccurate in saying that petitioners were fully compensated by being paid for the time actually worked. They were not paid for any time worked during 8 hours of each day which were incorrectly characterized as eating and sleeping time. The record shows that they did work during this period and petitioners' question number two is specifically directed to this point.

The Wage and Hour Division, as quoted above, provides that they should be paid for such work.

The respondent again uses misleading language in footnote 5, page 9 wherein it is stated that the Senate Committee on Post Office and Civil Service has the same understanding with respect to the Federal Employees Pay Act as the Wage and Hour Division formerly did with respect to the Fair Labor Standards Act. This is incorrect. The portion of the Committee Report quoted by respondent has to do with an amendment to the 1954 Federal Employees Pay Act, *not* the 1945 Act applicable in this case. The 1954 Act provided premium payments for firefighters in lieu of the overtime provided in the 1945 Act herein applicable. The amendment being discussed provides payment of time-and-a-half *in addition* to the premium pay for all hours worked over the scheduled tour of duty, i.e., over 24 hours. Of course the Committee understood

that no overtime was to be paid for any hour *in the tour of duty* whether for work, standby, eating or sleeping because the firefighters received premium pay. Thus it was entirely proper for the record to show that since the firefighters were compensated for mealtimes and nighttimes on the job by the premium pay provision, they should not receive additional overtime compensation.

Respondent next claims that to allow recovery to petitioners would be novel and contrary to the consistent practice under the Fair Labor Standards Act and applicable Federal pay statutes. To refute that statement, we need only to cite *Farley* v. *United States, supra*, and *England* v. *United States, supra*, decided by the court below, wherein full recovery was allowed for sleeping and eating time. In other courts full recovery has also been ordered. *General Electric Co.* v. *Porter, supra*, and *Glen L. Martin Nebraska Co.* v. *Culkin, supra*.

The principle is as old as *M.K. & T. Railway* v. *United States*, 231 U.S. 112 (1913). Also cf. *Chicago, Rock Island & Pac. Rwy. Co.* v. *United States*, 253 Fed. 555 (8th Cir. 1918) and the *current policy* of the Wage and Hour Division as mentioned above.

The principle of compensating employees for time given to the employer for the employer's benefit is not novel or inconsistent.

**B. Respondent Misconstrues the Opinions of the Various Circuit Courts of Appeals in an Attempt to Find a Lack of Conflict With the Present Case**

Respondent's argument attempts to differentiate the factual situations in certain cases cited by petitioners in order to show there is no conflict between those de-

cisions and the decision in the case at bar. We shall analyze the arguments case by case.

In *Central Missouri Telephone Co. v. Connell*, 170 F. 2d 641 (8th Cir. 1948), we prefer to look to the exact wording of the court's opinion than to the paraphrasing of respondent. In that opinion, on page 646, it is stated:

> "The number of calls through each of the exchanges varied greatly. The load, as it is called in the record, usually decreased considerably by eleven o'clock or midnight, and thereafter calls were infrequent. . . . Some nights the operators were able to get several hours of uninterrupted sleep, while other nights they were disturbed at frequent intervals and obtained very little sleep. In any event they were required to be in the exchange ready to serve . . . They were not there for the purpose of sleep nor for any purpose of their own, but for their employer's benefit."

Thus we find a factual situation squaring with Finding 14 of the court below in the case at bar:

> "The nighttime calls were for periods of varied duration, lasting from a few minutes to several hours, and there were some rare occasions when plaintiffs would be up and engaged on calls throughout the night hours. There were nights when there would be a succession of calls for long periods, or several short periods. During some nights there would be no calls, and on a few occasions there would be continuous all-night activity."

And in Finding 11:

> ". . . Thus it was necessary for all firefighters to be available for duty all hours of the night, or the function of the base would not be adequately performed."

This Court, in *Armour & Co.* v. *Wantock*, *supra*, laid down the test— Is the time spent predominantly for the employer's benefit or for the employee's?

In the *Central Missouri Telephone Co.* case, *supra*, the court applied that test and permitted a full recovery. In the case at bar the court below ignored that test.

Let us refer to the second case cited by respondent, *F. W. Stock & Sons* v. *Thompson*, 194 F. 2d 493 (6th Cir. 1952). In that case, on page 496, the court adopted the conclusion of the District Judge that the lunch period of employees working in a mill should be compensable and said, at pages 496-7:

> "Time spent predominantly for the employer's benefit during a period, although designated as a lunch period or under any other designation, nevertheless constitutes working time compensable under the provisions of the Fair Labor Standards Act."

In the case at bar that test was not applied.

In *General Electric Co.* v. *Porter*, *supra*, wherein full recovery was ordered, respondent seeks to distinguish a case involving firefighters on the ground that the court took into account that the firefighters had to protect not only the employer's plant area, but two populous communities as well, thus greatly increasing the probability of an alarm at night. Respondent has apparently overlooked Finding 10 of the Court below.

> "Among the specific activities of plaintiffs' 24-hour day were the following;
>
> * * *.
>
> "(e) fire calls to nearby cities in accordance with agreement with organized fire departments;

Midwest City, population 24,000; Dell City, population 7,000; Oklahoma City,"

On this point, as on others, the two cases are almost identical on the basis of facts.

In *Glen L. Martin Nebraska Co.* v. *Culkin, supra,* firefighters were required to be on call during a 30-minute lunch which they were allowed to eat in the cafeteria. The time for which compensation is claimed is this 30-minute period. The defendant contended that the firefighters were required to answer calls during the lunch period in comparatively few instances. However, the court said, at page 984:

> "But the question was not so much whether the guards and firemen were actually regularly called upon to put down overt acts of violence, sabotage, disturbances, or to put out fires during the 30-minute period, as it was whether they were performing their regular duties during that period and were then substantially performing the duties assigned to them by their employer and were not free to follow pursuits of a purely private nature . . .
>
> ". . . the firemen were likewise obligated to be constantly vigilant to prevent fires, yet both the guards and the firemen served to a considerable extent in a stand-by capacity. In the latter respect both were engaged in their regular duties during the 30-minute period as effectively as if they were putting down disturbances or putting out fires."

In the case at bar, the mealtimes of petitioners were even further restricted in that they were required to remain at their post of duty and were not free to go to the cafeteria. Unless they had been on the job, "the

function of the base would not be adequately performed." (F. 11)

In the *Glen L. Martin Nebraska Co.* case, *supra*, the court followed the test laid down by this Court in determining whether the service was primarily for the benefit of the employer. In the case at bar the test followed by the Court of Claims was whether the plaintiffs performed substantial physical labor. It ignored the test of benefit and the fact that these petitioners were engaged to wait.

**C. By Ignoring the Conflict of the Present Case With Prior Decisions in the Court of Claims Respondent Tacitly Recognizes It**

Respondent states the Court of Claims has consistently followed the rule that under the Federal Employees Pay Act of 1945, an employee is to be compensated only for substantial periods of actual labor during meal and nighttimes. This is patently erroneous and for proof one has only to refer to the cases of *Farley* v. *United States, supra*, and *England* v. *United States, supra*, wherein full compensation for all sleeping and eating hours was ordered for the reason that "plaintiff's freedom of choice to follow her own habits was restricted for the benefit of the defendant . . ." There was no record of substantial labor before the Court. On the contrary, the record shows infrequent interruptions which are unsupported by log records or any evidence other than plaintiff's own testimony.

It is significant that respondent does not attempt to distinguish the facts and set forth the differences in *Farley* and *England* despite its claim. If respondent had done so, it would have discovered no difference and that it had clearly misstated the court's decisions in those cases.

In this respect respondent has fallen into the same error that the Court of Claims has committed in its opinion in the present case. The court below stated on page 4 of that opinion that "compensation was allowed because substantial labor was performed during the times set apart for sleeping and eating." We respectfully note that the court below in its opinion in *Farley* stated, "The issue remains still the single one of whether the plaintiff was on duty in excess of 40 hours per week." The court below in *Farley* found plaintiff was on duty because the order covering her hours so stated, the same as in the case at bar, and because her freedom of choice to follow her own habits was restricted *for the benefit of the defendant.*

In *Farley* the court below thus correctly applied the test set out in *Armour & Co.* v. *Wantock, supra.*

It is noteworthy that the court below in denying recovery did not cite or attempt to distinguish or reconcile its holding with either the facts *or the law* in the opinions of the Eighth and Ninth Circuits which have allowed full recovery for nighttime duty. Rather, the court stated that the decisions of the Seventh Circuit only, and of the Court of Claims provided authority for its holding. It did not distinguish Court of Claims cases denying recovery from the *Farley* and *England* cases (where recovery was allowed) and the present case which is substantially identical with *Farley* and *England.* It found only an "intimation of approval" by the Supreme Court in *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944) written fifteen years ago when the *old* Wage and Hour Interpretation was in effect.

According to respondent's admission, the court applies the test of whether substantial physical labor

was performed during eating and nighttimes. This is in conflict with the ruling of this Court in *Armour & Co.* v. *Wantock, supra,* which provides that the test shall be "whether time is spent predominantly for the employer's benefit or for the employee's . . ." It is in conflict with *Skidmore* v. *Swift & Co.*, 323 U.S. 134— ". . . we hold that no principle of law found either in the statute or in court decisions precludes waiting time from also being working time." The performance of labor is not the test.

The cases of *Gaetke* v. *United States, supra; Sawyer* v. *United States, supra,* and *Ahearn* v. *United States,* No. 332-55, C.Cls. May 7, 1958, have all been extensively treated in our petition and specifically in Section III, page 18, showing that the decisions of the court below are in conflict. However, it is again pointed out that in the *Gaetke* case the court below found the arrangement between plaintiff and defendant was embodied in a formal contract and that the contract was fulfilled. In the *Sawyer* case, the court predicated its decision on the authority in *Gaetke.* The reasoning and test applied in the *Farley* and *England* cases were not followed.

In *Ahearn* v. *United States, supra,* the court below did allow recovery for actual physical labor performed during the night hours and meal times, and although respondent says that the court below has consistently allowed such recovery, such statement is inaccurate with respect to the case at bar as no recovery was allowed for actual physical labor shown by the written record to have been performed during eating and night hours.

There is thus a clear conflict between the cases cited, all decided by the court below and all having identical

factual situations, except in the case of *Gaetke* wherein there was a formal written contract not present in the other cases.

The decisions in *Collins* v. *United States*, No. 141-56, C.Cls., and *Avary* v. *United States*, No. 266-56 C.Cls., both decided March 5, 1958, were on summary judgment and not decisive of the real issues, although the court below again referred to its test as to whether actual physical labor was performed during the hours for which no compensation was ordered. This test is contrary to the earlier test laid down in the *Farley* and *England* cases and in the decision in *Armour & Co.* v. *Wantock*, *supra*, decided by this Court.

*Wright* v. *United States*, No. 232-57, C.Cls. January 14, 1959, is a companion case to the case at bar and was decided on the same day for the same reasons. It must, therefore, be considered along with the case at bar as being in conflict with the above-cited cases for the reasons specified by petitioners.

In short, we have a situation wherein this Court laid down the test to be followed in *Armour & Co.* v. *Wantock*, *supra*. That test was subsequently applied to the first two cases decided by the Court of Claims: *Farley* v. *United States*, *supra*, and *England* v. *United States*, *supra*. In all subsequent decisions, it completely ignored the test and reached a conclusion of thinking which excluded eating and nighttime from being compensable and justified it on the basis that no substantial physical labor was performed therein, which is completely contrary to the reasoning of this Court wherein it stated,

> "Of course, an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for

> something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity. Readiness to serve may be hired quite as much as service itself and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer." *Armour & Co.* v. *Wantock, supra,* at page 133.

It is time that this Court assert the validity of its opinion and settle the issue decisively for the guidance of all courts and especially the court below.

## IV

## RESPONDENT IGNORES THE QUESTIONS AS TO NIGHT DIFFERENTIAL AND PAY FOR ACTUAL LABOR

Respondent's reply has failed to answer the question of night differential pay as covered in Section IV of petitioners' petition.

Respondent's reply has also failed to cover the question of compensation for actual hours of physical labor performed and interruptions during eating and nighttimes, as specifically raised by petitioners.

## V

## CONCLUSION

Prior petitions for writs of certiorari did not present the conflict that engulfs this question.

The decisions of the Court of Claims and the various appellate courts are in a hopeless state of confusion. The decisions in the Court of Claims cannot be reconciled with each other, nor with the decisions in the Circuit Courts of Appeals. The Court of Claims has failed except in the first two cases decided, to apply the

principle laid down by this Court as the test for determining hours of employment. For these reasons and the fact that the question is one affecting employees of the United States Government and the proper interpretation of the statute determining their employment, the Court should grant this petition and resolve the difficulty these questions present.

Respectfully submitted,

DONALD S. DAWSON
*Attorney for Petitioners*
731 Washington Building
Washington 5, D. C.

*Of Counsel*

SAVAGE, GIBSON, BENEFIELD & SHELTON
Liberty Bank Building
Oklahoma City, Oklahoma

August 24, 1959

FILE COPY

Office-Supreme Court, U.S.
FILED
OCT 27 1959
JAMES R. BROWNING, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1960

---

No. 190

---

MERLIN M. ARMSTRONG, ET AL., *Petitioners*

v.

THE UNITED STATES, *Respondent*

---

## PETITION FOR REHEARING

---

DONALD S. DAWSON
*Attorney for Petitioners*
731 Washington Building
Washington 5, D. C.

*Of Counsel:*

SAVAGE, GIBSON, BENEFIELD & SHELTON
Liberty Bank Building
Oklahoma City, Oklahoma

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

## INDEX


| | Page |
|---|---|
| PETITION—INTRODUCTION | 1 |
| I. THE QUESTION AT ISSUE HAS NEVER BEEN CONSIDERED ON ITS MERITS BY THIS COURT | 2 |
| II. THE FACTS IN ALL CASES CITED AS BEING IN CONFLICT ARE BASICALLY IDENTICAL | 4 |
| III. THE COURT BELOW HAS BEEN INCONSISTENT AND INACCURATE IN ASSIGNING REASONS FOR THE DECISIONS CITED AS BEING IN CONFLICT | 6 |
| IV. THE COURT BELOW ERRED IN NOT ALLOWING COMPENSATION FOR ACTUAL PHYSICAL LABOR PERFORMED DURING NIGHTTIME HOURS | 8 |
| CONCLUSION | 10 |


## TABLE OF CASES


| | |
|---|---|
| *Ahearn* v. *United States*, No. 332-55, C. Cls., May 7, 1958 | 4, 5, 9 |
| *Armour & Co.* v. *Wantock*, 323 U.S. 126 (1944) | 3, 7 |
| *Avary* v. *United States*, No. 266-56, C. Cls., Mar. 5, 1958 | 8 |
| *Collins* v. *United States*, No. 141-56, C. Cls., March 5, 1958 | 8 |
| *England* v. *United States*, 133 C. Cls. 768 (1956) | 4, 5, 7 |
| *Farley* v. *United States*, 133 C. Cls. 776 (1955) | 4, 5, 7 |
| *Gaetke* v. *United States*, 136 C. Cls. 756, 145 F. Supp. 913 (1956) | 5 |
| *M.K. & T. Railway Co.* v. *United States*, 231 U.S. 112 (1913) | 3 |
| *Sawyer* v. *United States*, 138 C. Cls. 152 (1957), cert. den. 355 U.S. 868 | 4, 5 |
| *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 137 (1944) | 3, 7 |


## STATUTES


| | |
|---|---|
| Federal Employees Pay Act of 1943, 57 Stat. 75 | 6 |
| Federal Employees Pay Act of 1945, 59 Stat. 295, as amended 5 U.S.C. 911, 921 | 3 |
| Federal Employees Pay Act of 1954, 68 Stat. 1111 | 6, 8 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1960

---

No. 190

---

MERLIN M. ARMSTRONG, ET AL., *Petitioners*

v.

THE UNITED STATES, *Respondent*

---

## PETITION FOR REHEARING

---

*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

Petitioners respectfully request that this Honorable Court reconsider its action of October 12, 1959 denying petition for certiorari for the following reasons:

1. The question at issue has never been considered on its merits by this Court.
2. The facts in all cases cited as being in conflict are basically identical.

3. The court below has been inconsistent and inaccurate in assigning reasons for the decisions cited as being in conflict.

4. The court below erred in not allowing compensation for actual physical labor performed during nighttime hours.

## I

## THE QUESTION AT ISSUE HAS NEVER BEEN CONSIDERED ON ITS MERITS BY THIS COURT

This case presents for decision the question of whether the Federal Government can keep its employees on the job all night without paying them.

Undoubtedly because of the lack of opportunity for oral argument and for fuller presentation of facts, the Court has failed to understand the importance of granting certiorari in this case. In its failure to grant certiorari, it has failed to carry out the most important role given to it by Congress and provided for in its own rules, namely, that of acting as arbiter in making the final decision on important questions involving the definitive interpretation of Federal statutes and of administering the policy governing the United States Courts of Appeals and the Court of Claims, so that each of these courts will not have its own separate and distinct interpretation of Federal laws which are in conflict with the decisions of each of the other courts.

Because this Court has failed to set the guideposts for the Court of Claims and the various Courts of Appeals, there are some four different final decisions on the same principle involving substantially the same set of facts. There are many cases involving these facts that will be affected by this Court's decision. For

example, 117 separate claims are consolidated in the present petition. Counsel for the petitioners have petitions presently pending in the Court of Claims which involve the claims of over 750 petitioners and the court below has pending before it some 101 cases for 2655 plaintiffs, all involving the same precise question. Substantial justice will thus be denied to several thousand Federal employees unless this Court makes a final decision in this murky field, which will give the courts a legal guidepost to stand out above the morass of conflict obscuring the way.

The factual situation is simple. The employees were engaged for 24 hours a day with the understanding they were to be on duty for that entire period. They were employed to provide 24-hour protection for the Government's property. If they had not been on the job it would have been necessary for the Government to have employed others and to pay them. The entire 24 hours devoted by these employees was for the benefit of the Government. They were only paid for 16 hours, although the applicable statute provided they should receive compensation for "all hours of employment."[1]

This Court has decided that time spent in a stand-by capacity during which the employees could play checkers, dominoes, or while away the time in purely personal pursuits was compensible.[2]

The same principle is applicable in the case at bar. The employee is under orders. He is giving up his per-

[1] Federal Employees Pay Act of 1945, 59 Stat. 295, as amended by 5 U.S.C. 911, 921.

[2] *Armour & Co.* v. *Wantock*, 323 U.S. 126 (1944); *Skidmore* v. *Swift & Co.*, 323 U.S. 134, (1944); *M.K. & T. Railway Co.* v. *United States*, 231 U.S. 112 (1913).

sonal freedom. He is not spending his time as he would choose. He is benefiting his employer. It is inconsistent to make a distinction between an employee who is subject to call but who is sleeping and one who is subject to call and is listening to the radio or playing solitaire.

This Court should consider the question of nighttime and eating time, *which it has never done*, and resolve the inability of the courts to reach a consistent pattern of reasoning. As it stands, the varying decisions of the courts below present doubt and uncertainty.

## II

## THE FACTS IN ALL CASES CITED AS BEING IN CONFLICT ARE BASICALLY IDENTICAL

In each of the cases previously cited as being in conflict in the court below,[3] the facts are identical, except as to the particular plaintiffs involved, their place of employment and their own specific duties.

All are Federal employees.

All are subject to the same statute.

All are subject to the same Civil Service Commission rules and regulations.

All were employed to work 24 hours a day.

All were required to be on duty for the benefit of the Government.

---

[3] *Farley* v. *United States*, 133 C. Cls. 776 (1955); *England* v. *United States*, 133 C. Cls. 768 (1956); *Sawyer* v. *United States*, 138 C. Cls. 152 (1957) cert. den. 355 U.S. 868 (1957); *Ahearn* v. *United States*, No. 332-55, C. Cls. May 7, 1958; and the case at bar.

None was covered by an agreement exempting the nighttimes and eating hours from being compensated.

All were engaged to wait.

With the facts being the same, the court below should have applied the same principle and reached the same conclusion in all cases, but instead, in two cases the decision was based upon a restriction in the plaintiff's freedom of choice to follow her own habits for the benefit of the Government.[4] In another case the court referred to an earlier decision[5] which did involve a specific employee contract exempting the night and eating hours from compensation, but in the case being decided, there was no such contract.[6] In another case[7] the court provided, contrary to the two cases just mentioned, for pay for actual physical labor performed during night hours and meal times. In still a further case,[8] the court below decided the question on the basis of what Congress meant by the words "hours of employment."

As a result of this conflict in reasoning, as applied to identical facts, the attorney has no guideline to follow in advising his clients. This court should declare the principle in no uncertain terms.

---

[4] *Farley* v. *United States*, *supra*; *England* v. *United States*, *supra*.

[5] *Gaetke* v. *United States*, 136 C. Cls. 756, 145 F. Supp. 913 (1956).

[6] *Sawyer* v. *United States*, 138 C. Cls. 152, cert. den. 355 U.S. 868.

[7] *Ahearn* v. *United States*, No. 332-55, C. Cls. May 7, 1958.

[8] The case at bar.

## III

## THE COURT BELOW HAS BEEN INCONSISTENT AND INACCURATE IN ASSIGNING REASONS FOR THE DECISIONS CITED AS BEING IN CONFLICT

It is respectfully noted that in the case at bar the court below stated the question to be "what Congress meant by the words 'hours of employment' ". That mere recitation of the question was the last and only reference to the legislative history of the applicable statute in its opinion. There is not one sentence, nay one phrase, of legislative history cited, except conjecture in one paragraph in which the court below expressed a belief in its own feeling. The fact is, there is no reference in the legislative history to any exception being made for plaintiffs.

On the other hand, the statute is crystal clear in its applicability to the plaintiffs as Federal employees by specifically citing their general classification. Although there are numerous exceptions cited in the statute, plaintiffs are not among those excepted. Although there are a number of sections preserving special forms of pay arrangements, the plaintiffs are not covered thereby even though the previous statute[9] did set up a special premium pay provision for their nighttime work which could have been continued had the Congress desired to keep them in a special class.

The succeeding statute[10] specifically referred to plaintiffs and made provision for compensation for nighttime work.

We think that the Congress in providing special pay arrangements for certain groups in the preceding

[9] Federal Employees Pay Act of 1943, 57 Stat. 75.

[10] Federal Employees Pay Act of 1954, 68 Stat. 1111.

statute and in the succeeding statute could not have overlooked the necessity for making provision for some form of pay for the night hours plaintiffs were required to be on the job. It would not expect them to be there without any compensation. Therefore, the absence of any special arrangement and the clear applicability of the statute to plaintiffs, the fact that exceptions were made for others confirms that Congress meant them to be paid for all hours on the job.

In its decision, the court below stated that employees are not entitled to compensation for time spent in sleeping and eating because that has been the uniform holding of the court except in two cases "where substantial labor was performed during the time set aside for sleeping and eating."

We respectfully note that the record does not show any substantial labor being performed in the two cases referred to: *Farley* v. *United States*, 133 C. Cls. 776 (1955) and *England* v. *United States*, 133 C. Cls. 768 (1956). In fact, the court stated in *Farley* v. *United States*, *supra*, that its basis for deciding in favor of the plaintiff was that "her freedom of choice to follow her own habits was restricted for the benefit of the defendant."

The court below furthermore states that it has been generally understood that sleeping and eating time should not be compensated because that was the clear intimation of this Court in *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944) and *Armour & Co.* v. *Wantock*, 323 U.S. 126 (1944). We respectfully submit this is inaccurate as no such inference can be drawn from those cases. In fact, the intimation is clearly the opposite:

> "Of course, an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for

something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity. Readiness to serve may be hired quite as much a service itself and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer." *Armour & Co.* v. *Wantock, supra.*

We respectfully note that the court below erred again in stating that the plaintiffs had been compensated for all work actually performed. Such is not the case for they were not compensated for any work actually performed during nighttime hours.

The court below refers in its opinion to a computation made to show the number of hours in which plaintiffs performed actual physical labor. But the court failed to state that this computation did not distinguish the work performed as between daytime and nighttime hours. The records actually show that much of the work was performed at night for which they received no pay.

## IV

## THE COURT BELOW ERRED IN NOT ALLOWING COMPENSATION FOR ACTUAL PHYSICAL LABOR PERFORMED DURING NIGHTTIME HOURS

The court below stated in *Avary* v. *United States*, C. Cls. No. 266-56 and *Collins* v. *United States*, C. Cls. No. 141-56 that "Time spent in actual labor during these periods (sleeping and eating time) is compensable under Sections 201 and 301 of the Federal Employees Pay Act, *supra*. To the extent that plaintiffs have not been compensated for work actually per-

formed during periods set aside for sleeping and eating, they are entitled to recover."

This same decision was reached in *Ahearn* v. *United States*, C. Cls. No. 332-55 (1958):

> "Where a substantial amount of time was spent on these duties during eating and sleeping time, such as desk watch for instance, plaintiffs are to be compensated therefor . . ."

The court below, therefore, erred in not allowing compensation for actual physical labor performed during sleeping and eating time by plaintiffs in the case at bar in accordance with the above quoted decisions, and as specifically prayed in the plaintiffs' original petition.

It should be noted that the case a bar was before the court below on the question of liability only. Proof need not have been adduced to show the exact amount claimed or the number of hours spent by each plaintiff in actual physical labor during sleeping and eating hours. Such proof after the question of liability had been determined in their favor, would have been placed before the court in due course and in accordance with the established rules.[11]

[11] Memorandum re Retrial Conference, 12/13/56.

## CONCLUSION

For the foregoing reasons petitioners move for a rehearing.

Petitioners' counsel certifies that this petition is presented in good faith and not for the purpose of delay on the basis of substantial grounds available to petitioners not previously presented.

Respectfully submitted,

DONALD S. DAWSON
*Attorney for Petitioners*
731 Washington Building
Washington 5, D. C.

*Of Counsel:*

SAVAGE, GIBSON, BENEFIELD & SHELTON
Liberty Bank Building
Oklahoma City, Oklahoma